(28,663)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 708.

CHARLES MUNTER, PLAINTIFF IN ERROR,

vs.

THE WEIL CORSET COMPANY, INC.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 16, 1922.

1 The President of the United States to the Marshal of the District of Conn. and to the Marshal of the [SEAL.] Southern District of New York, Greeting:

You are hereby commanded to summon Charles Munter, of the Borough of Manhattan, City and State of New York, to appear before the United States District Court for the District of Connecticut, to be held at Hartford, within and for the District of Connecticut, on the first Monday of September, A. D. 1918, then and there to answer unto The Weil Corset Company Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, having its principal place of business in the City of New Haven, County of New Haven, State of Connecticut, and said District, it now being a citizen and resident of the City of New Haven, in the County of New Haven, State of Connecticut, in the District of Connecticut, and unto Samuel Weil, Joseph A. Weil and Ray Weil, all being citizens, and resident- of said Town and County of New Haven, State of Connecticut in said District of Connecticut, in a civil action wherein the plaintiffs complain and say:

1. That at all times hereinafter mentioned, the defendant, Charles Munter, was and now is, a citizen of and resident in the City of New York and in the Southern District of New York.

2. That at all times hereinafter mentioned, the plaintiffs were and now are citizens and residents of the City of New Haven, County of New Haven, State of Connecticut, in the District of Connecticut.

3. That on the 21st day of October, 1913, and for some time prior thereto, the plaintiff corporation, The Weil Corset Company Inc., was known as the "Ottenheimer Weil Company," but that thereafter, and prior to the commencement of this action, the name of the plaintiff corporation was duly changed from the "Ottenheimer Weil Company" to "The Weil Corset Company Inc.," pursuant to the laws of the State of Connecticut in such
8 cases made and provided, and said corporation, since said change, has been and now is legally known as The Weil Corset Company, Inc.

4. That heretofore, and on or about the 21st day of October 1913, the plaintiff, The Weil Corset Company, Inc. under its then name Ottenheimer Weil Company, and the other plaintiffs herein entered into a certain agreement in writing, dated on that day, with the defendant Charles Munter, a copy of which agreement is hereunto annexed, marked Exhibit A, and made a part hereof.

5. In pursuance to said Exhibit A and upon order of the defendant, the plaintiffs from time to time between October 10, 1914, and November 7, 1914, manufactured for the defendant, and de-

livered to the defendant *on* other persons, firms and corporations, such as the defendant directed, as more fully stated in Exihibt B, hereinafter referred to, "Nulife Garments" (referred to in Exhibit A,) consisting of corsets, shoulder braces, men's, women's and children's abdominal supporters, at the times and in the quantities and styles more fully stated in a Bill of Particulars hereto annexed, marked Exhibit B, and made a part hereof, all of the value of Six Thousand Forty One Dollars and Ninety-Eight Cents ($6,041.98). Said prices and value were agreed upon by the plaintiffs and the defendant.

6. That between the first day of October, 1914, and the 13th day of November, 1914, the plaintiffs, at the request of the defendant, and upon the orders and directions of the defendant, and in pursuance to the provisions of Exhibit A, manufactured for the defendant other garments known as "Nulife Garments," consisting of corsets, shoulder braces and men's, women's and children's abdominal supporters, of the pattern and design specified by the defendant, and of the kind, quality and material as specified by the defendant at the agreed price of the sum of One Thousand Two Hundred Thirty One Dollars Fifty Eight Cents
3 ($1,231.58), as more fully stated by Exhibit C, hereto annexed, and made a part hereof.

7. The defendant agreed to pay for the merchandise referred to in Exhibit C at the time the merchandise therein was ordered by the defendant (prior to Nov. 14, 1914), (a more particular date the plaintiffs are unable to state), but the defendant had refused to accept, receive or pay for the merchandise referred to in Exhibit C or any part thereof, and the plaintiffs have at all times since the manufacture of the goods referred to in Exhibit C stored the same for the benefit of the defendant, and subject to his order, and there is now due and owing to the plaintiffs from the defendant for the goods, wares and merchandise so manufactured and referred to in Exhibit C, the sum of One Thousand Two Hundred Thirty One Dollars and Fifty Eight Cents ($1,231.58), no part of which has been paid.

8. The plaintiffs have otherwise duly performed all the provisions of said Exhibit A on their part to be performed.

Wherefore the plaintiffs demand judgment against the defendant for the sum of Seven Thousand Two Hundred Seventy Three Dollars and Fifty Six cents ($7,273.56) damages, with interest thereon from November 13, 1914, besides the costs and disbursements of this case.

Benjamin Slade of New Haven is recognized in $150.00 to prosecute, etc.

Of this writ, with your doings thereon, make due service and return.

Witness the Hon. Edwin S. Thomas, Judge of the District Court of the United States for the District of Connecticut, and the seal of said District Court, at Hartford, on this 5" day of June, 1918, and of the independence of the United States of America the 142nd.

C. E. PICKETT,
Clerk U. S. District Court.

4 "EXHIBIT A."

Agreement made this 21 day of October, 1913, between Ottenheimer, Weil Co. a corporation duly organized and existing under the laws of the State of Connecticut, party of the first part, Samuel J. Weil and Ray Weil, his wife, and Joseph A. Weil, all of New Haven, in the State of Connecticut, parties of the second part and Charles Munter, of the City and State of New York, party of the third part, in manner following:

Whereas, the party of the third part is the sole patentee, proprietor and manufacturer of and has the exclusive right to manufacture and vend the articles known as Nulife garments, consisting or corsets, shoulder braces and men's, women's, and children's abdominal supporters, and is engaged in the business of manufacturing and selling said garments in the Borough of Manhattan, City and State of New York, and

Whereas, the party of the first part maintains and operates in the City of New Haven and State of Connecticut, a factory for manufacturing corsets and other articles, and

Whereas, the parties of the second part constitute the Board of Directors of said party of the first part and are the holders of all the capital stock of said party of the first part, and

Whereas the party of the first part has solicitied and is endeavoring to obtain from the party of the third part orders to manufacture for the party of the third part such Nulife garments, consisting, as aforesaid, of corsets, shoulder braces, and abdominal supporters, and the party of the third part may in the future give to the party of the first part orders to manufacture such corsets, shoulder braces and abdominal supporters or any thereof on such terms and conditions and at such prices as may be agreed upon between him and the said party of the first part and if such orders be given *some* shall also be upon the terms and conditions hereinafter stated;

Now therefore, in consideration of the premises and One Dollar to each of the parties of the first part and second parts in hand paid and to induce the said party of the third part to give to said party of the first part such order or orders to manufacture for him, the said party of the third part, Nulife garments, or any thereof, as aforesaid, as he, at his option, shall determine, the said parties of the first part and second parts *to* hereby, jointly and severally covenant, promise and agree to and with the party of the third part, as follows:

1. That neither the said party of the first part nor any of its employees, agents, servants, directors, officers, stock holders, or other

representatives whatsoever shall manufacture for, vend, sell or give away to any person or persons whomsoever any of said garments known as Nulife garments consisting of corsets, shoulder braces and abdominal supporters, or any thereof.

2. That all patterns and designs for or of said Nulife garments, or any thereof, that may or shall be made by the party of the first part for the party of the third part, as well as all such patterns and designs that may or shall be delivered by the party of the third part to the party of the first part, shall always belong to and be the property of the party of third part and shall be surrendered and delivered up to the party of the third part by the party of the first part whenever said party of the third part shall cease giving to said party of the first part orders to manufacture said garments, or any thereof.

3. That whenever said party of the third part shall cease giving to the party of the first part orders to manufacture said garments or any thereof, that then and in that event the said party of the first part shall deliver over to the party of the third part all such garments made for him by the party of the first part and ordered by and then still undelivered to the party of third part and party of the third part shall and agrees to pay the price therefor agreed upon, provided, however, that such garments shall have been made in accordance with sample and to the full and entire personal satisfaction of the party of the third part.

4. For the purposes of this agreement and further for the purposes of ascertaining whether or not the terms thereof have been complied with party of the third part and his representatives shall have free access to the books, papers and vouchers of the party of the first part.

5. That the words "cease giving" wherever used herein shall and shall be construed to mean "Final cessation of the giving" of orders to party of the first part.

In witness whereof, the parties hereto have signed and sealed this instrument the day and year first above written.

In Presence of
(Signed)

SAMUEL WEIL. [L. S.]
JOSEPH A. WEIL. [L. S.]
RAE WEIL. [L. S.]

Acknowledgment dated New Haven, Conn., October 21, 1913.

6 "EXHIBIT B."

Statement of Merchandise Manufactured by the Plaintiff and Shipped upon Order of the Defendant.

October 10, 1914, the following goods shipped to Kaufman Bros., Pittsburgh, Pa., and invoiced to the defendant:

1 doz. style 965 at $14 per doz.....	14.00	
2 " " 968 " 18 " "	36.00	
2 " " 966 " 14 " "	28.00	
		78.00

October 12, 1914, the following goods shipped to Kaufman Bros., Pittsburgh, Pa., and invoiced to the defendant:

1 doz. style 965 at $14 per doz.....	14.00	
½ " " 958 " 14 " "	7.00	
3½ " " 968 " 18 " "	63.00	
		84.00

The following merchandise was shipped to the defendant direct at his place of business at 141 West 36th Street, New York City:

2 doz. form corsets at $30 per doz.....	60.00	
		60.00

October 13, 1914, the following goods shipped to R. H. White & Co., Boston, Mass., and invoiced to the defendant:

3 doz. style 968 at $18 per doz.....	54.00	
1½ " " 966 " 14 " "	21.00	
		21.00

October 13, 1914, the following goods shipped to Oscar Michaels, Newark, N. *H.*, and invoiced to the defendant:

1 doz. style 965 at $14 per doz.....	14.00	
2⅓ " " 966 " 14 " "	32.67	
1⅛ " " 968 " 18 " "	22.50	
5 5/12 " 958 " 14 " "	75.83	
		145.00

October 13, 1914, the following goods shipped to Oscar Michaels, Newark, N. J., and invoiced to the defendant:

2½ doz. style 968 at $18 per doz.....	40.50	
4 " " 966 " 14 " "	56.00	
1¼ " " 965 " 14 " "	17.50	
2½ " " 958 " 14 " "	35.00	
		149.00

October 13, 1914, the following merchandise shipped to the defendant direct at his place of business at 141 West 36th Street, New York City:

1/12 doz. style 966 (special) at 18.....	1.50	
1/12 " " 968 " " 24.....	2.00	
		3.50

7 October 14, 1914 the following goods shipped to Kaufman Bros., Pittsburgh, Pa. and invoiced to the defendant:

1 doz. style 965 at $14. per doz.....	14.00	
4 " " 968 " $18. " "	72.00	
		86.00

October 14, 1914, the following goods shipped to Kaufman Bros., Pittsburgh, Pa. and invoiced to the defendant:

3 doz. style 965 at $14. per doz.....	42.00	
1-11/12 doz. style 966 @ $14. per doz.....	26.83	
		68.83

October 14, 1914, the following goods shipped to Bellas, Hess & Co., New York City and invoiced to the defendant:

4 doz. style 966 at $14. per doz.....	56.00	
1 doz. " 958 " 14. " "	14.00	
		70.00

October 15, 1914, the following goods shipped to Kaufman Bros., Pittsburgh, Pa. and invoiced to the defendant:

1½ doz. style 966 at $14. per doz.....	21.00	
2 " " 965 " 14.00 " "	28.00	
1½ " " 968 " 18.00 " "	27.00	
		76.00

October 15, 1914, the following goods shipped to Oscar Michaels, Newark, N. J. and invoiced to the defendants:

4¾ doz. style 968 at $18. per doz.....	85.50	
4 " " 965 " 14. " "	56.00	
¼ " " 966 " 14. " "	3.50	
1 " " 988 " 14. " "	14.00	
		159.00

October 16, 1914, the following goods shipped to Bellas, Hess & Co., New York City and invoice to the defendant:

3 doz. style 966 at $14. per doz.....	42.00	
		42.00

October 16, 1914, the following goods shipped to Montgomery, Ward Co., Chicago, Ill., and invoiced to the defendant:

17½ doz. style 958 at $14. per doz.....	245.00	
		245.00

October 16, 1914, the following goods shipped to Oscar Michaels, Newark, N. J. and invoiced to defendant:

2-5/12 doz. style 966 at $14. per doz.....	33.83	
1½ " " 958 at 14. " "	21.00	
1½ " " 968 " 18. " "	19.50	
		74.33

October 16, 1914, the following goods shipped to Oscar Michaels, Newark, N. J. and invoiced to defendant:

3 doz. style 966 at $14. per doz.....	42.00	
1 " " 968 " 18. " "	18.00	
1 " " 965 " 14. " "	14.00	
		74.00

8 October 17, 1914, the following goods shipped to The May Co., Cleveland, Ohio and invoiced to defendant:

5¾ doz. style 965 at $14. per doz.....	$80.50	
1 " " 966 " 14. " "	14.00	
5½ " " 958 " 14. " "	77.00	
3-7/12 " " 968 " 18. " "	64.50	
		236.00

October 19, 1914, the following goods shipped to Oscar Michaels, Newark, N. J. and invoiced to defendant:

1 doz. style 965 at $14. per doz.....	14.00	
2-5/12 " " 966 " 14. " "	33.83	
1½ " " 968 " 18. " "	27.00	
		74.83

October 20, 1914, the following goods shipped to Oscar Michaels, Newark, N. J. and invoiced to defendant:

2-5/12	doz.	style	968	at	$18.	per	doz.	.....	43.50
2	"	"	965	"	14.	"	"	.....	28.00
7/12	"	"	966	"	14.	"	"	.....	8.17
									79.67

October 21, 1914, the following goods shipped to The May Co., Cleveland, Ohio and invoiced to defendant:

1½	doz.	style	958	at	$14.	per	doz.	.....	21.00
3¼	"	"	966	"	14.	"	"	.....	45.50
¼	"	"	968	"	18.	"	"	.....	4.50
									71.00

October 21, 1914, the following goods shipped to The May Co., Cleveland, Ohio and invoiced to defendant:

1½	doz.	style	968	at	$18.	per	doz.	.....	27.00
1	"	"	965	"	14.	"	"	.....	14.00
2½	"	"	966	"	14.	"	"	.....	35.00
									76.00

October 21, 1914, the following goods shipped to The May Co., Cleveland, Ohio and invoiced to defendant:

3½	doz.	style	966	at	$14.	per	doz.	.....	49.00
1½	"	"	969	"	18.	"	"	.....	27.00
									76.00

October 21, 1914, the following goods shipped to The May Co., Cleveland, Ohio and invoiced to defendant:

5	doz.	style	966	at	$14.	per	doz.	.....	70.00
									70.00

October 21, 1914, the following goods shipped to Oscar Michaels, Newark, N. J. and invoiced to defendant:

1/6	doz.	style	968	at	$18.	per	doz.	.....	3.00
									3.00

9 October 22, 1914, the following goods shipped to The May Co. Cleveland, Ohio and invoiced to defendant:

5/12	doz.	style	969	at	$18	per	doz.	.....	7.50
1½	"	"	966	"	14	"	"	.....	21.00
3	"	"	965	"	14	"	"	.....	42.00
									70.50

October 22, 1914, the following goods shipped to Bellas Hess & Co. New York City and invoiced to defendant:

4 doz. style 966 at $14 per doz.	56.00	
1 " " 958 " 14 " "	14.00	
		70.00

October 22, 1914, the following goods shipped to Montgomery, Ward Co. Chicago, Ill. and invoiced to defendant:

12½ doz. style 958 at $14 per doz.	175.00	
		175.00

October 23, 1914, the following goods shipped to The May Co., Cleveland, Ohio and invoiced to defendant:

2½ doz. style 958 at $14 per doz.	35.00	
2 " " 966 " 14 " "	28.00	
6½ " " 965 " 14 " "	91.00	
4 " " 968 " 18 " "	72.00	
		226.00

October 24, 1914, the following goods shipped to The May Co., Cleveland, Ohio and invoiced to the defendant:

½ doz. style 968 at $18 per doz.	9.00	
3 " " 965 " 14 " "	42.00	
¾ " " 958 " 14 " "	10.50	
¾ " " 969 " 18 " "	13.50	
		75.00

October 26, 1914, the following goods shipped to Green, Joyce Co. at Columbus, Ohio and invoiced to defendant:

1 doz. style 965 at $14 per doz.	14.00	
3 " " 966 " 14 " "	42.00	
1 " " 968 " 18 " "	18.00	
		74.00

October 26, 1914 the following goods shipped to Green, Joyce Co. at Columbus, Ohio and invoiced to Defendant:

3 doz. style 966 at $14 per doz.	42.00	
1 " " 958 " 14 " "	14.00	
1 " " 965 " 14 " "	14.00	
		70.00

October 26, 1914 the following goods shipped to Green, Joyce Co. at Columbus Ohio and invoiced to defendant:

3½ doz. style 958 at 14 per doz.	49.00	
1½ " " 966 " 14 " "	21.00	
		70.00

10 October 26, 1914 the following goods shipped to Green, Joyce Co. at Columbus, Ohio and invoiced to defendant:

2	doz.	style	968	at	$18	per	doz.	.....	36.00
½	"	"	969	"	18	"	"	.....	9.00
1½	"	"	966	"	14	"	"	.....	21.00
1	"	"	965	"	14	"	"	.....	14.00
									80.00

October 26, 1914 the following goods shipped to Green, Joyce Co. at Columbus, Ohio and invoiced to defendant:

3 5/6	doz.	style	958	at	$14	per	doz.	.....	53.67
5/6	"	"	968	"	18	"	"	.....	15.00
1/12	"	"	966	"	14	"	"	.....	1.17
¼	"	"	965	"	14	"	"	.....	3.50
									73.34

October 26, 1914 the following goods shipped to Green, Joyce Co. at Columbus, Ohio and invoiced to defendant:

2½	doz.	style	958	at	14	per	doz.	.....	35.00
1½	"	"	969	at	18	"	"	.....	9.00
1 7/12	"	"	966	at	14	"	"	.....	22.17
5/12	"	"	968	at	18	"	"	.....	7.50
									73.67

October 26, 1914 the following goods shipped to Green, Joyce Co. at Columbus Ohio and invoiced to defendant:

3	doz.	style	966	at	15	per	doz.	.....	42.00
1	"	"	965	"	14	"	"	.....	14.00
1	"	"	968	"	18	"	"	.....	18.00
									74.00

October 26, 1914 the following goods shipped to Bellas Hess Co. New York City and invoiced to defendant:

5	doz.	style	965	at	$14	per	doz.	.....	70.00
									70.00

October 26, 1914 the following goods shipped to Green Joyce Co. at Columbus Ohio and invoiced to defendant:

4	doz.	style	966	at	$14	per	doz.	.....	56.00
1	"	"	968	"	18	"	"	.....	18.00
									74.00

October 26, 1914 the following goods shipped to The May Co. Cleveland Ohio and invoiced to defendant:

1	doz.	style	965	at	$14	per	doz.	.....	14.00
2	"	"	966	"	14	"	"	.....	28.00
2	"	"	968	"	18	"	"	.....	36.00
									78.00

October 27, 1914 the following goods shipped to Green, Joyce Co. at Columbus Ohio and invoiced to defendant:

4 doz. style 966 at $14 per doz.	56.00	
1 " " 965 " 14 " "	14.00	
		70.00

11 October 27, 1914 the following goods shipped to Green, Joyce Co. at Columbus, Ohio and invoiced to defendant:

3¼ doz. style 966 at $14 per doz.	45.50	
1 " " 968 " 18 " "	18.00	
¾ " " 958 " 14 " "	10.50	
		74.00

October 27, 1914 the following goods shipped to the defendant direct at his place of business at 141 West 36th St. New York City:

½ doz. style 966 at $14 per doz.	4.67	
¾ " " 958 " 14 " "	10.50	
		15.17

October 27, 1914 the following goods shipped to Green, Joyce Co. at Columbus Ohio and invoiced to defendant:

3 doz. style 966 at $14 per doz.	42.00	
1 " " 965 " 14 " "	14.00	
1 " " 958 " 14 " "	14.00	
		70.00

October 28, 1914 the following goods shipped to The May Co. at Cleveland, Ohio and invoiced to defendant:

3¼ doz. style 965 at $14 per doz.	45.50	
2 1/6 " " 966 " 14 " "	30.33	
4 5/12 " " 068 " 18 " "	79.50	
		155.33

October 28, 1914 the following goods shipped to Bellas, Hess Co. New York City and invoiced to defendant:

5 doz. style 966 at $14 per doz.	70.00	
		70.00

October 29, 1914 the following goods shipped to Green, Joyce Co. at Columbus, Ohio and invoiced to defendant:

1 7/12 doz. style 968 at $18 per doz.	28.50	
⅓ " " 966 " 14 " "	4.67	
3 " " 965 " 14 " "	42.00	
		75.17

October 29, 1914 the following goods shipped to Green, Joyce Co. at Columbus, Ohio and invoiced to defendant:

3¼ doz. style 966 at $14 per doz.	45.50	
1¾ " " 968 " 18 " "	31.50	
		77.00

October 29, 1914 the following goods shipped to the defendant direct at his place of business at 141 West 36th St. New York City:

1/12 doz. style 966 at $14 per doz.	1.17	
1/12 doz. " 968 " 18 " "	1.50	
1/12 " " 969 " 18 " "	1.50	
		4.17

12 October 30, 1914, the following goods shipped to Green, Joyce Co. at Columbus, Ohio and invoiced to defendant:

3 doz. style 968 at $18 per doz.	54.00	
2 " " 965 " 14 " "	28.00	
		82.00

October 30, 1914 the following goods shipped to Green, Joyce Co. at Columbus Ohio and invoiced to defendant:

3 doz. style 968 at $18 per doz.	54.00	
1 " " 965 " 14 " "	14.00	
1 " " 966 " 14 " "	14.00	
		82.00

October 30, 1914 the following goods shipped to Green, Joyce Co. at Columbus, Ohio and invoiced to defendant:

1/12 doz. style 958 at $14 per doz.	1.17	
		1.17

October 30, 1914 the following goods shipped to Mrs. J. A. McIntyre, Putnam, Conn. and invoiced to defendant:

1/12 doz. style 696 (extra size) at $24 per doz.	2.00	
Postage parcel post	.12	
		2.12

October 31, 1914 the following goods shipped to Green, Joyce Co. at Columbus, Ohio and invoiced to defendant:

2 doz. style 958 at $14 per doz.	28.00	
3 " " 968 " 18 " "	54.00	
		82.00

November 2nd, 1914 the following goods shipped to Green, Joyce Co. at Columbus, Ohio and invoiced to defendant:

5 doz. style 968 at $18 per doz.	90.00	
		90.00

November 2, 1914 the following goods shipped to Poole Dry Goods Co. at Springfield Mass. and invoiced to defendant:

1	doz. style 968 at $18 per doz.	18.00	
1½	" " 966 " 14 " "	21.00	
2½	" " 965 " 14 " "	35.00	
			74.00

November 2, 1914 the following goods shipped to Montgomery, Ward Co. Chicago, Ill. and invoiced to defendant:

15	doz. style 958 at $14 per doz.	210.00	
			210.00

13 November 2, 1914, the following goods shipped to Poole Dry Goods Co. at Springfield Mass. and invoiced to defendant:

½	doz. style 958 at $14 per doz.	7.00	
1½	" " 968 " 18 " "	27.00	
2	" " 966 " 14 " "	28.00	
1	" " 965 " 14 " "	14.00	
			76.00

November 2, 1914 the following goods shipped to Poole Dry Goods Co. at Springfield Mass. and invoiced to defendant:

½	doz. style 968 at $18 per doz.	9.00	
3½	" " 966 " 14 " "	49.00	
1	" " 965 " 14 " "	14.00	
			72.00

November 3, 1914 the following goods shipped to Poole Dry Goods Co. Springfield, Mass. and invoiced to defendant:

3	doz. style 958 at $14 per doz.	42.00	
1½	" " 968 " 14 " "	27.00	
½	" " 966 " 14 " "	7.00	
			76.00

November 3, 1914 the following goods shipped to Bellas, Hess Co. New York City and invoiced to defendant:

4½	doz. style 966 at $14 per doz.	63.00	
½	" " 958 " 14 " "	7.00	
			70.00

November 3, 1914 the following goods shipped to Green, Joyce Co. at Columbus Ohio and invoiced to defendant.

4	doz. style 966 at $14 per doz.	56.00	
1	" " 965 at 14 " "	14.00	
			70.00

November 4, 1914, the following goods shipped to to Poole Dry Goods Co. at Springfield Mass and invoiced to defendant:

2	doz.	style	966	at	$14	per	doz.	28.00	
1	"	"	958	"	14	"	"	14.00	
1	"	"	965	"	14	"	"	14.00	
1	"	"	968	"	18	"	"	18.00	
									74.00

November 4, 1914, the following goods shipped to Poole Dry Goods Company, Springfield Mass. and invoiced to defendant:

1	doz.	style	966	at	$14	per	doz.	14.00	
½	"	"	968	"	18	"	"	9.00	
½	"	"	958	"	14	"	"	7.00	
3	"	"	965	"	14	"	"	42.00	
									72.00

14 November 4, 1914 the following goods shipped to Bellas, Hess Co. New York City and invoiced to defendant:

4	doz.	style	966	at	$14	per	doz.	56.00	
1	"	2	958	"	14	"	"	14.00	
									70.00

November 4, 1914, the following goods shipped to Bellas, Hess Co. New York City and invoiced to defendant:

1/12	doz.	style	966	at	$14	per	doz.	1.17	
									1.17

November 4, 1914 the following goods shipped to R. H. White & Co. Boston, Mass., and invoiced to defendant:

2	5/12	doz.	style	966	at	$14	per	doz.	33.83
3⅓		"	"	973	"	14	"	"	46.67
									80.50

November 4, 1914 the following goods shipped to the defendant direct at his place of business 141 West 36th St. New York City:

1	1/12	doz.	style	966	at	$14	per	doz.	15.17
1/12		"	"	965	"	14	"	"	1.17
¼		"	"	968	"	18	"	"	4.50
1/6		"	"	958	"	14	"	"	2.33
									23.17

November 5, 1914 the following goods shipped to Poole Dry Goods Co. at Springfield, Mass. and invoiced to defendant:

1½ doz. style 968 at $18 per doz.	27.00	
1½ " " 966 " 14 " "	21.00	
2 " " 965 " 14 " "	28.00	
		76.00

November 5, 1914 the following goods shipped to Poole Dry Goods Co. Springfield, Mass. and invoiced to defendant:

1 7/12 doz. style 958 at $14 per doz.	22.17	
1 1/12 " " 968 " 18 " "	19.50	
1 " " 966 " 14 " "	14.00	
1 1/12 " " 965 " 14 " "	15.17	
1/6 " " 969 " 18 " "	3.00	
		73.84

November 6, 1914 the following goods shipped to Poole Dry Goods Co. at Springfield, Mass. and invoiced to defendant:

3 doz. style 966 at $14 per doz.	42.00	
½ " " 958 " 14 " "	7.00	
1 " " 965 " 14 " "	14.00	
½ " " 968 " 18 " "	9.00	
		72.00

November 6, 1914 the following goods shipped direct to the defendant at 141 West 36th St. New York City:

4⅓ doz. style 958 at $14 per doz.	60.67	
⅔ " " 966 " 14 " "	9.33	
		70.00

15 November 7, 1914 the following goods shipped direct to the defendant at 141 West 36th Street, New York City:

2 doz. silk corsets at $36 per doz.	72.00	
1 " style 966 " 14 " "	14.00	
		86.00

November 7, 1914 the following goods shipped to Poole Dry Goods Co. Springfield, Mass. and invoiced to defendant:

3½ doz. style 968 at $18 per doz.	63.00	
1½ " " 965 " 14 " "	21.00	
		84.00

November 7, 1914 the following goods shipped to Poole Dry Goods Co. Springfield, Mass. and invoiced to defendant:

1½	doz.	style	966	at	$14	per	doz.	21.00	
2¼	"	"	968	"	18	"	"	40.50	
1¼	"	"	958	"	14	"	"	17.00	
									79.00

November 13, 1914 the following goods shipped to Montgomery, Ward Co., Chicago, Ill. and invoiced to defendant:

3¾ doz. style 958 at $14 per doz.	52.50	
		52.50
Total		$6,041.98

16 & 17 "EXHIBIT C."

Prior to Nov. 14, 1914, a more particular date the plaintiffs are unable to state.

33¼	Doz.	Style	966	@	14.00	465.50	
6	"	"	968	"	18.00	108.00	
1½	"	"	3665	"	18.00	27.00	
18 1/6	"	"	965	"	14.00	254.33	
16¼	"	"	958	"	14.00	227.50	
6 5/12	"	"	969	"	18.00	115.50	
6¾	"	"	966	"	5.00	33.75	
							$1,231.58

Endorsement on Back.

I hereby certify, That on the 6th day of June 1918, at the City of New York, in my district, I personally served the within Writ and Complaint upon the within-named Defendant, Charles Munter, at Hotel McAlpin B'way and 33rd Street, N. Y. by exhibiting to him the within originals and at the same time leaving a copy of each thereof.

THOMAS D. McCARTHY,
United States Marshal,
Southern District of New York.

Dated June 17th 1918.

A true copy.
Attest:
[SEAL.] C. E. PICKETT,
Clerk.

18 [Endorsed:] Form No. 680. No. 2093. In the District Court of the United States for the District of Connecticut. The Weil Corset Co. et al. vs. Charles Munter. Writ and complaint.

Filed June 5th 1918. C. E. Pickett, Clerk. Slade, Slade & Slade, Attorneys for Plaintiffs, New Haven, Ct.

19 & 20 United States District Court for the District of Connecticut.

THE WEIL CORSET COMPANY, INC., of the City and County of New Haven, in the State of Connecticut,

vs.

CHARLES MUNTER, of the County and State of New York.

Motion to Erase from the Docket.

August 30, 1918.

The defendant moves that the above entitled case be erased from the docket, because it appears from the writ and complaint therein that the defendant was at the time of the commencement of said action a resident of the State of New York, and it appears from the return thereon that service of said writ and complaint was not otherwise made upon him than by leaving a copy of said writ and complaint with him in the Borough of Manhattan, City, County and State of New York.

CHARLES MUNTER,
Defendant,
By FREDERICK C. TAYLOR,
His Attorney.

A true copy:
Attest:
—— ——, *Clerk.*

21 [Endorsed:] Form No. 680. No. 2093. In the — Court of the United States for the District of Connecticut. The Weil Corset Company, Inc. vs. Charles Munter. Motion to Erase from the Docket. Filed Aug. 30, 1918. C. E. Pickett, Clerk, by —— ——, Deputy. Frederick C. Taylor, Counsellor at Law, Stamford, Conn.

22 District Court of the United States, District of Connecticut.

No. 2093. Law.

THE WEIL CORSET CO. et al.

vs.

CHARLES MUNTER.

Memorandum.

THOMAS, *District Judge:*

This suit is an action at law to recover damages for an alleged breach of contract.

The defendant, specially appearing, challenges the jurisdiction of this Court by a written motion to erase the case from the docket, and the motion reads as follows:

"because it appears from the Writ and complaint therein that the defendant was at the time of the commencement of said action a resident of the State of New York, and it appears from the return thereon that service of said writ and complaint was not otherwise made upon him than by leaving a copy of said writ and complaint with him in the Borough of Manhattan, City, County and State of New York."

The motion contained no prayer for judgment.

Section 5 of Chapter CCLV, of the U. S. Statutes at Large, approved June 1, 1872, so far as is here pertinent, declares:

"That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Concerning pleas to the jurisdiction, Section 5630 of the General Statutes of Connecticut, Revision of 1918, provides,—inter
23 alia:

"If the defendant desires to plead to the jurisdiction, or in abatement, or both, he shall take such exceptions in one plea, substantially in the following form:

The defendant pleads in abatement, because (Here state all the particular exceptions to the jurisdiction, and causes of abatement, and how the plaintiff might, or should, have brought his action in order to avoid them, if they are such as could have been avoided). And—Therefore he prays judgment. By A. B., his attorney."

See also Forms 339 and 340 on page 441 in the Connecticut Practice Book. From an examination of these forms it will be seen that they strictly follow the statute which requires that the pleader shall conclude his plea with the prayer for judgment, and under the decisions of the Supreme Court of Errors of the State of Connecticut it is indispensible to pray for judgment and the decisions of that Court hold that unless that is done the plea is bad. Coughlin v. McElroy, 72 Conn. 444, 448; Mitchell v. Smith, 74 Conn., 125.

In the Mitchell case, Judge Hammersley, speaking for the Supreme Court of Errors, page 127, said, respecting the plea in abatement:

"The plea did not contain a prayer for judgment, and for this reason was undoubtedly bad."

It likewise is the settled law of Connecticut that pleas in ab-tement are little favored. Budd, Admr. v. Meriden Electric R. R. Co., 69 Conn. 272; Brockett v. Fair Haven & Westville R. R. Co., et al., 73 Conn. 428.

The defendant relies upon The G. M. Williams Co. v. C. F. Mairs, et al., 72 Conn. 430, to sustain his contention that a motion to dismiss is proper, but as I view it the case is distinguishable from the case at bar.

True, in the Williams case, Justice Baldwin, on page 435, said:

24 "It was therefore competent for the defendants, after entering a special appearance for the purpose of objecting to the assumption of jurisdiction, to move that the cause be erased from the docket."

This decision was predicated on a Connecticut Statute which required that when the garnishee named in a process of foreign attachment is a non-resident, but is engaged in the transaction of business in this State by an agent, service on the latter shall be sufficient to hold all the effects of the defendant which were then in the hands of the garnishee's agent in this State, as well as any debt due from the garnishee to the defendant; and another section of said Statute declared that service on such garnishee shall be sufficient notice to a non-resident defendant to enable the plaintiff to bring the absent to trial.

Under the foregoing Statute, the court holds that in order to give Connecticut courts jurisdiction, it must appear from the writ and complaint, or from the officer's return that the non-resident's garnishee had an agent who was engaged in the transaction of business for the garnishee in the State of Connecticut, on whom personal service was made at a time when he had in his hands, as such agent, goods of the defendant, or when his principal was indebted to the defendant by reason of an obligation contracted by such agent in his principal's behalf.

The material facts in the Williams case were that the writ and complaint showed that defendant and garnishees were all residents of New York City, and hence the case did not come within said statutes.

Upon such state of facts and law, the Court ruled that the Connecticut courts had no jurisdiction, and granted a motion to erase the case from the docket.

But manifestly it appears that a motion to erase is proper
25 only when the lack of jurisdiction is apparent on the face of the papers, excluding the Marshal's return of service, as for example—a suit pending in a Federal Court between two aliens, as was the case in Cunard Steamship Co. v. Smith, 255 Fed. 847, or between citizens of the same state, or for an understatement of the ad damnum, or for any other of a number of reasons which clearly appear on the face of the record, and it was to meet such a situation that the Supreme Court of Errors held that the motion to erase the case from the docket was proper. In the case at bar the record dis-

closes everything necessary to give the Court jurisdiction (except the alleged defective service). Here the complaint sets forth the residence of the plaintiff as being in this District and that of the defendant as in New York City within the Southern District of New York, and the ad damnum is within the jurisdiction of the Court.

The defendant claims that he is not properly before the Court because the only service made upon him was by a United States Marshal leaving with him a copy of the complaint in the Borough of Manhattan, City and State of New York, but this objection was waived by the defendant's failure to take advantage of it by a plea to the jurisdiction and in abatement, concluding with a prayer for judgment, as is required under the Connecticut Statutes and the decisions of the Supreme Court of Errors.

It is also a well-settled rule that a presumption in favor of jurisdiction exists until such presumption is defeated in the case clearly showing want of jurisdiction.

Section 51 of the Judicial Code declares, so far as is here applicable, that,

26 & 27 "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

The complainant shows that the plaintiff resides in Connecticut and the defendant in New York and the necessary diversity of citizenship is set forth so that jurisdiction over the action is vested in this court.

The motion to erase is denied.

So ordered.

June 12, 1919.

A true copy.

Attest:

[SEAL.] C. E. PICKETT,
Clerk.

28 [Endorsed:] Form No. 680. No. 2093 Law. In the District Court of the United States, for the District of Connecticut. The Weil Corset Co. et al., vs. Charles Munter. Opinion denying motion to erase. Thomas, District Judge. Filed June 12th, 1919. C. E. Pickett, Clerk, by —— ——, Deputy.

29 Alex. Sidney Rosenthal, 1476-1478 Bway., Rooms 314, 315, 316.

District Court of the United States, District of Connecticut.

#2093. Law.

THE WEIL CORSET COMPANY, Plaintiff,

against

CHARLES MUNTER, Defendant.

CITY, COUNTY & STATE OF NEW YORK, *ss:*

Alex. Sidney Rosenthal, being duly sworn, deposes and says: I am an Attorney and Counsellor-at-law, having an office at No. 1476 Broadway, in the Borough of Manhattan, City, County and State of New York, and duly admitted to practice in the Courts of the State of New York, and by order of this Court, deponent is duly licensed to practice in the District Court of the United States, District of Connecticut.

That I appear here specially as attorney for the defendant for the sole purpose of challenging the jurisdiction of the Court, and to move for an order to erase from the docket of this Court.

The action was brought in or about the month of August, 1918, by the plaintiff, a corporation, having its place of business in the County of New Haven, State of Connecticut, against the defendant, a resident and citizen of the City, County and State of New York, to recover damages for a breach of contract.

Service of the Writ and Complaint were made upon the defendant in the Borough of Manhattan, City, County and State of New York on June 6th, 1918, and a return thereof made to the Clerk of this Court on June 17th, 1918.

30 That it appears from said return that the said service was made by Thomas McCarthy, United States Marshall for the Southern District of New York, at the Hotel McAlpin, in said City, County and State of New York.

Thereafter, the defendant appearing specially by Frederick C. Taylor, Esq. of Stamford, Conn., moved this Court for an order to erase from the docket the above entitled action upon the ground that it appeared from the Writ and Complaint that the defendant was at the time of the commencement of said action a resident of the State of New York, and that the Court was without jurisdiction of the person of the defendant.

Thereafter, and on June 12th, 1919, the said motion was denied by the Honorable Edwin S. Thomas.

The action is now set for trial for the 28th day of November, 1921, and the defendant now moves this Honorable Court for an order vacating and set-ing aside the decision of June 12th, 1919, and directing that the above entitled action be erased from the docket of the Court.

That the motion comes on to be heard before this Court, under the following circumstances:

Deponent on October 28th, 1921, wrote to the Honorable Edwin S. Thomas, asking permission of the Court to review the authorities upon which deponent contends that the Court erred in its decision, and that certain facts had not been presented to the Court which would have materially affected its determination.

Deponent desires to call to the attention of the Court that in 1915 an action was brought in the Supreme Court of the State of New York, County of New York, by the plaintiff above-named against the defendant above-named, to recover damages for breach of the contract, which forms the basis of this suit, and in which
31 the prayer for judgment demanded the relief now sought to be recovered herein.

That the said motion appeared for trial in Trial Term, Part XVI thereof, on the 17th, 18th and 19th days of December, 1917, and on consent of counsel, the complaint was dismissed, and judgment entered in favor of the defendant against the plaintiff for the sum of Three Hundred and Eighty-two and 21/100 ($382.21) Dollars as the costs of the defendant in said action.

That hereto attached is a certified copy of the judgment entered in said action.

That deponent on November 15th, 1921, wrote to Messrs. Slade & Slade, New Haven, Connecticut, notifying them, the attorneys for the plaintiff herein, as follows:

Re Weil vs. Munter.

"GENTLEMEN:

As Special Counsel for Prof. Charles Munter, I desire to notify you that I shall appear before the Honorable Judge Edwin S. Thomas at the United States District Court House in your city on Friday, November 18th, 1921, with reference to the above matter.

The time and place was designated by His Honor after a personal conversation had with him, and the notification herewith to you is done at the instructions given to me, to present a reargument on the "motion to erase the service of the process on the defendant."

I hope you will see your way clear to be present at that time.

Respectfully yours,

(Signed) ALEX. SIDNEY ROSENTHAL."

A. S. R.: S. C.

That in reply thereto, your deponent received from the said firm of Slade, Slade & Slade, a communication dated November 16th, 1921, as follows:

In re Weil Corset Company vs. Munter.

"DEAR SIR:

We herewith acknowledge receipt of yours of the 15th inst. in the above matter.

Our Mr. Benjamin Slade, who is personally in charge of this matter, will endeavor to arrange his engagements so as to be on hand at the United States District Court at the Court House in New Haven (Post Office Building) on Friday, November 18, 1921, at 11 A. M., at which time, we ascertained, the court will hear your motion.

Yours very truly,

(Signed) SLADE, SLADE & SLADE."

B. S.: T. V. B.

32 That pursuant to said notice, deponent appeared before this Court on November 18th, 1921, in support of the motion herein, and Benjamin Slade, Esq. of counsel for the plaintiff, appeared in opposition thereto.

That the contention of deponent was that under the authorities, the service of the Writ and Complaint upon the defendant herein, as indicated by the return to the Clerk of the Court, was void, and that the Court has power at any time, upon its own volition, to dismiss or set aside the proceeding upon the ground that it was without jurisdiction.

ALEX. SIDNEY ROSENTHAL.

Sworn to before me, this 21st day of November, 1921.
SEBASTIAN CERINO,
Commissioner of Deeds for the City of New York.

Certificate filed in New York County, #225.

33 & 34 Supreme Court, New York County.

WEIL CORSET COMPANY, INC., Plaintiff,

against

CHARLES MUNTER, Defendant.

This action having been duly reached in its regular order on the trial calendar of this court and the issues therein having duly come on for trial before Mr. Justice John Ford and a Jury in Trial Term Part XVI thereof on the 17th, 18th and 19th days of December, 1917, and on consent of counsel on both sides the complaint and counterclaim having been dismissed but not on the merits.

Now on motion of Herman Joseph, attorney for the defendant, it is

Ordered and adjudged that the complaint and counterclaim herein be dismissed but not upon the merits, with costs to the defendant and the costs of the defendant having been duly taxed at $382.21, it is further

Ordered and adjudged that the defendant, Charles Munter, do recover of the plaintiff, Weil Corset Co. Inc. the sum of Three hundred and eighty two 21/100 dollars $382.21 costs and disbursements, and that he have execution therefor.

Judgment signed, entered and filed this 13th day of March, 1918.

[SEAL.] WM. F. SCHNEIDER,
Clerk.

A true copy.
W. F. SCHNEIDER,
Clerk.

A true copy.
Attest:
C. E. PICKETT,
Clerk.

35 [Endorsed:] Clerk's Index No. 2093—Law. U. S. District Court, District of Connecticut. The Weil Corset Co. et. — Plaintiff, against Charles Munter, Defendant. Affidavit. Alex. Sidney Rosenthal, special appearance for Defendant, 1476 Broadway, New York City. To Slade & Slade Esqs., Attorneys for Plaintiff, New Haven, Conn.

36 United States District Court, District of Connecticut.

At Law.

No. 2093.

THE WEIL CORSET CO. et al.

vs.

CHARLES MUNTER.

Memorandum on Matter Argued November 18, 1921.

On September 27, 1921, this case was assigned for trial on November 28, 1921. On Saturday, November 26, 1921 the motion made and herein discussed was denied and counsel for defendant was notified to be ready for trial on Monday, November 28th, and at the same time was notified that a written memorandum would be subsequently filed.

The history of this case shows that a suit claiming $7,273.56 damages was brought June 6, 1918, returnable on the first Monday of September 1918. From the allegations of the writ it appears that the plaintiff resides in Connecticut and the defendant resides in New York.

The Marshal's return of service shows that on June 6, 1918 personal service on the defendant was made at the Hotel McAlpin in the City of New York

"by exhibiting to him the within originals and at the same time leaving with him a copy of each thereof,"

which return was made by the United States Marshal for the Southern District of New York.

On August 30, 1918, the defendant filed a "Motion to Erase the Case from the Docket" and for the reasons stated in an opinion filed June 12, 1919 the motion was denied.

No further steps were taken by defendant until November, 1921. In the meantime the case had been twice assigned for trial, at the request of the plaintiff, but had gone off at the suggestion
37 of counsel for plaintiff who advised the Court that this course was adopted at the request of defendant.

Early in November, defendant through counsel, and ex parte, asked for a day when the Court could hear a motion affecting the case which counsel desired to file, and pursuant to that request, and after notice to counsel for plaintiff, hearing was had on November 18th, but no motion was filed. The defendant at argument asked to have the decision of June 12, 1919, re-opened, and attacked the jurisdiction of the Court to try the cause already set for trial on November 28th.

Hearing was had, nevertheless, on November 18th, even though no motion had been filed, and the argument made by defendant resolved itself into a request to the Court to open the old order and dismiss the case for want of jurisdiction. Counsel for defendant was given leave to file such motion papers as counsel deemed necessary to meet the situation, not later than Tuesday, November 22nd. Certain papers were received on Wednesday, November 23rd and such papers are entitled—"Affidavit of Alex. Sidney Rosenthal, Attorney for defendant, appearing specially" in which affidavit "the defendant now moves for an order vacating and setting aside the decision of June 12, 1919 and directing that the above-entitled action be erased from the docket of the Court."

For the reasons stated in the opinion filed June 12, 1919 the order denying the motion to erase the case from the docket must stand unless this Court is without jurisdiction apparent on the face of the record, in which event the case will be dismissed by the Court on its own motion. But the jurisdictional facts are sufficiently set forth in the complaint—sufficient at least to show that this Court has jurisdiction of the cause of action. It is alleged that the plaintiff is a resident of Connecticut, that the defendant is a resident of New York and the claim for damages is above
38 $3,000, exclusive of costs and interest, thus showing on the face of the record that allegations to support the general jurisdiction of the court are present.

But the defendant's contention is directed against the service of the papers on the defendant in New York and he cites and relies upon a long line of cases with which there is no contention and no dispute, of which First National Bank v. Williams, 252 U. S. 504 and Gutschalk v. Peck, 261 Fed. 212 are leading examples.

The law there laid down is clear and there is no dispute about it and no dispute as to just what the decisions are.

But counsel for defendant fails to distinguish or differentiate between the necessary allegations apparent on the face of the record to support the general jurisdiction of the Court and those exemptions which are in the nature of a personal privilege and which may be waived. The former can never be waived. The latter may be and when waived, the jurisdiction of the Court is complete, provided the allegations as to general jurisdiction are apparent on the face of the record.

But he urges that he has not waived the privilege but has strenuously insisted upon it. And while this is true, it is nevertheless true that the defective service of which the defendant complains, was not and never has been properly taken advantage of by the defendant, as will more fully appear by reference to the opinion filed June 18, 1919. The defendant, by failing to follow up the ruling made on June 12, 1919, is guilty of gross laches and by his laches has waived his right and this is the equivalent of an actual waiver of the privilege under the statute accorded him—to object to the jurisdiction.

This result appears to be not the fault of present counsel,
39 and the Court does not intend to even express an opinion as to whose fault it is, as it is sufficient to conclude as herein indicated.

It is clearly apparent in St. Louis, etc. Railway v. McBride, 141 U. S. 127, that the defect complained of here may be waived and that defective service is not sufficient to defeat the general jurisdiction of the Court, where the Supreme Court of the United States, speaking by Justice Brewer said, on page 131;

"The first part of section 1 of the act of 1887, as amended in 1888, gives, generally, to the Circuit Courts of the United States jurisdiction of controversies between citizens of different States where the matter in dispute exceeds the sum of two thousand dollars exclusive of interest and costs. Such a controversy was presented in this complaint. It was, therefore, a controversy of which the Circuit Courts of the United States have jurisdiction. Assume that it is true as defendant alleges that this is not a case in which jurisdiction is founded only on the fact that the controversy is between citizens of different States, but that it comes within the scope of that other clause, which provides that 'no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant,' still the right to insist upon suit only in the one district is a personal privilege which he may waive, and he does waive it by pleading to the merits. In Ex parte Schollenberger, 96 U. S. 369,

378, Chief Justice Waite said; 'The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive.' The judiciary act of 1789 Sec. 11, 1 Stat. 79, besides giving general jurisdiction to Circuit Court over suits between citizens of different States, further provided, generally, that no civil suit should be brought before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that of which he was an inhabitant, or in which he should be found. In the case of Toland v. Sprague, 12 Pet. 300, 330, it appeared that the defendant was not an inhabitant of the State in which the suit was brought, nor found therein. In that case the Court observed: 'It appears that the party appeared and pleaded to issue. Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties by any acts of theirs to give it But that is not the case. The Court had jurisdiction over the parties and the matter in dispute; the objection was that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him. * * * Now, this was a personal privilege, which may be waived, and that appearing and party to waive. The cases of Pollard v. Dwight, 4 Cranch, 421, and Barry v. Foyles, 1 Pet. 311, are decisive to show that, after appearance and plea, the case stands as if the suit were brought in the usual manner. And the first of these cases proves that exemption from liability to process, and that in case of foreign attachment, too, is a personal priviles-, which may be waived, and that appearing and pleading will produce that waiver.' In Lexington v. Butler, 14 Wall. 282, the jurisdiction of the Circuit Court over a controversy between citizens of different States was sustained in a case removed from the state court, although it was conceded that the suit could not have been commenced in the first instance in the Circuit Court. See also Claflin v. Commonwealth Ins. Co., 110 U. S. 81.

Without multiplying authorities on this question, it is obvious that the party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit, has been brought in the wrong district. Charlotte Nat. Bank v. Morgan, 132 U. S. 141; Fitzgerald Construction Co. v. Fitzgerald, 137 U. S. 98."

In Interior Construction and Improvement Co. vs. Gibney, 160 U. S. 217, Mr. Justice Gray, in speaking for the Supreme Court of the United States, said on page 219:

"The act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866, confers upon the Circuit Courts of the United States original jurisdiction of all civil actions, at common law or in equity, between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000; and provides that 'where the jurisdiction is founded only in the

fact that the action is between citizens of different States,
41 suit should be brought only in the district of the residence of either the plaintiff or the defendant.' 24 Stat. 552; 25 Stat. 433.

The Circuit Courts of the United States are those vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different States. Diversity of citizenship is a condition of jurisdiction, and when that does not appear upon the record the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance, without taking the objection."

To recapitulate—if the parties to this suit were not citizens of different States, the Court, of its own motion, would dismiss the action; or if the amount of the matter in dispute was less than $3,000, the same course would necessarily follow, as those matters of general jurisdiction cannot be waived.

But the defendant's right to object that an action, within the above allegation, called the general jurisdiction of the Court, is brought in the wrong district may be waived. Such waiver may be by an act of commission such as pleading to the merits—or by an act of omission, such as failure to pursue the privilege promptly. Failure to take any action in two years and four months constitutes and is equivalent to a waiver of the privilege under all the circumstances of this case, and the defendant is now estopped to insist upon a privilege, especially as it appears that the statute of limitation has now run against the plaintiff's alleged cause of action. Besides, the present motion is as defective as the original motion by
42 & 43 which advantage is sought to be taken of the privilege granted by the statute.

The rule here applicable is clearly stated by the Supreme Court of Connecticut in Post v. Williams, 33 Conn. 147 at page 154, as follows:

"The general rule is that where the court has jurisdiction of the parties and the cause, and there has been in the course of the proceedings an irregularity which might be fatal, as the omission to do some act required by law or the doing it improperly, the objection may be waived, or a party may be estopped from raising it."

It therefore follows that both the Motion to Re-open and the Motion to Dismiss are denied.

Ordered accordingly.

November 30, 1921.

A true copy.

Attest:

[SEAL.] C. E. PICKETT,
Clerk.

44 [Endorsed:] Form No. 680. No. *No.* 2093. At Law. In the District Court of the United States for the District of Connecticut. The Weil Corset Co. et al. vs. Charles Munter. Opinion. Thomas, District Judge. Filed 30 November, 1921. C. E. Pickett, Clerk, by —— ——, Deputy.

45 United States District Court, District of Connecticut.

THE WEIL CORSET COMPANY, INC., SAMUEL WEIL, JOSEPH A. WEIL, RAY WEIL

vs.

CHARLES MUNTER.

Samuel Weil, of the Town and County of New Haven, State of Connecticut, being duly sworn, deposes and says:

I am now and every since 1914, and prior thereto have been the president of the Weil Corset Company, the plaintiff in the above entitled action, and I am one of the plaintiffs in the above entitled action, mentioned in the writ and complaint. I am familiar with the complaint, Bill of Particulars, and Exhibits A, B and C, and the contents thereof.

That the defendant is justly indebted to the plaintiffs in said action in the sum of Seven Thousand Two —dred Seventy Three Dollars Fifty Six Cents ($7,273.56) and all of said indebtedness accrued and became payable on or about the 7th day of November 1914, with interest on said sum from the 7th day of November 1914, to the first day of November, 1921, at six per cent, amounting to the sum of Three Thousand Fifty Four Dollars, ($3,054.00), making a total indebtedness of Ten Thousand Three Hundred Twenty Seven Dollars Fifty Six Cents ($10,327.56), all of which sum is justly due the plaintiffs, no part of which has been paid.

Mr. Benjamin Slade, of the firm of Slade, Slade & Slade, who are the attorneys for the plaintiffs in the above entitled cause, has from time to time notified me that this case had been assigned for trial on several occasions, but they have consented to have the assign-
ment of the case for trial go off the trial list for the purpose of
46 giving the defendants an opportunity to be present and contest the allegations set forth in said complaint, but the defendant has failed and neglected to appear or file his answer therein.

SAMUEL WEIL.

Subscribed and sworn to before me this 28th day of November, 1921.

[SEAL.] SAM. H. PLATCOW,
Notary Public.

A true copy.

Attest:

[SEAL.] C. E. PICKETT,
Clerk.

47 [Endorsed:] Form No. 680. No. 2093. In the District Court of the United States for the District of Connecticut. The Weil Corset Co., Samuel Weil, Joseph A. Weil, Ray Weil vs. Charles Munter. Affidavit of Samuel Weil, re Judgment of Default. Filed 28th November, 1921 C. E. Pickett, Clerk, by —— ——, Deputy.

48 District Court of the United States, District of Connecticut.

At Law.

#2093.

THE WEIL CORSET COMPANY a Corporation Duly Organized under and by Virtue of the Laws of the State of Connecticut and Having Its Principal Place of Business in the City of New Haven, County of New Haven, State of Connecticut, in the District of Connecticut, and Samuel Weil and Joseph A. Weil and Ray Weil, *Both Citi-* All Citizens and Residents of the Town and County of New Haven, said State, in said District of Connecticut,

against

CHARLES MUNTER, of the Borough of Manhattan, City and State of New York.

Judgment.

This action, claiming $7,273.56 damages, with interest thereon from Nov. 13, 1914, came to this Court on the first Monday of September, 1918, and thence to the — day of ——, 1918, when the defendant entered a special appearance, and thence to August 30, 1918, when the defendant filed a motion to erase the case from the docket for the reasons therein stated, and thence to the 12th day of June, 1919, when the Court denied said motion; thence the action was set by the court for November 28, 1921, and prior to said November 28, 1921, *yhr* defendant appeared by new counsel, who moved to reopen the decision of the Court of June 12, 1919, aforesaid; and thence said cause and said motion affecting said decision came on for a hearing on November 18, 1921, and the Court having fully heard counsel for the plaintiff- and defendant, denied said latter mo-

tion; and thence said cause came on for trial on November 28, 1921,
when plaintiff- appeared, but the defendant made default
49 & 50 of appearance, and during the day of November 28, 1921,
upon the order of the Court, the Clerk of said Court communicated with counsel in New York, on the long distance telephone, notifying defendant's counsel of the fact that said cause was set for trial on said November 28, 1921, and said defendant's counsel notified the Court that he did not purpose to proceed further in said cause,

Whereupon, this Court, on said November 28, 1921, duly heard the plaintiff- in said cause, and such proof as was presented, and the Court finds that the allegations in the complain- *and* true, and that the defendant is justly indebted to the plaintiff- in the sum of $7,273.56, with interest thereon from the 13th day of November, 1914, at the rate of six per cent;

Whereupon, it is ordered, adjudged and decreed that the plaintiffs, The Weil Corset Company, Incorporated, Samuel Weil, Joseph A. Weil and Ray Weil recover of the defendant, Charles Munter, the sum of $7,273.56 damages, with interest thereon from November 13, 1914, amounting to the sum of $3,054.00; and with $10.00 costs, aggregating in the whole the sum of $10,337.56.

Dated at Hartford, this 6th day of December, 1921.

EDWIN S. THOMAS,
U. S. D. J.

A true copy.
Attest:

[SEAL.] C. E. PICKETT,
Clerk.

51 [Endorsed:] Form No. 680. No. 2093 Law. In the District Court of the United States for the District of Connecticut. The Weil Corset Co. vs. Charles Munter. Judgment. Filed December 6th, 1921. C. E. Pickett, Clerk, by —— ——, Deputy.

52 & 53 United States District Court for the District of Connecticut.

THE WEIL CORSET COMPANY, INC., Plaintiff,

against

CHARLES MUNTER, Defendant.

To the Honorable Edwin S. Thomas, judge of said court:

And now comes the defendant by Elijah N. Zoline, his attorney, and feeling himself aggrieved by the final judgment of this court, entered against him, and in favor of the plaintiff, on the 6th day of December, 1921, and hereby prays that a Writ of Error may be allowed to him from the Supreme Court of the United States to the District Court of the United States for the District of Con-

necticut, and in connection with this petition, petitioner herewith presents his assignment of errors.

Petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of the cause and that the amount of security may be fixed by the order allowing the writ of error.

ELIJAH N. ZOLINE,
Attorney for Defendant.

A true copy.
Attest:
[SEAL.] C. E. PICKETT,
Clerk.

54 [Endorsed:] Form No. 680. No. 2093 Law. In the District Court of the United States for the District of Connecticut. The Weil Corset Company, Inc., Plaintiff, vs. Charles Munter, Defendant. Petition for Writ of Error. Filed 28th December, 1921. C. E. Pickett, Clerk, by —— ——, Deputy. Elijah N. Zoline, Atty. for Defendant, 35 Nassau Street, New York City.

55 United States District Court for the District of Connecticut.

THE WEIL CORSET COMPANY, INC., Plaintiff,

against

CHARLES MUNTER, Defendant.

Assignment of Errors.

1. The court erred in denying the motion made by the defendant, appearing specially for the sole purpose of challenging the jurisdiction of the United States District Court for the District of Connecticut to quash the service of the subpœna and complaint, which motion was made on the ground that service of the subpœna and complaint was made on the defendant outside of the District of Connecticut, to wit, in the City and State of New York, and for which reason, the United States District Court for the District of Connecticut was without jurisdiction over the person of the defendant, and which said motion was denied by the court on June 12, 1919.

2. The court erred in denying the motion made by the defendant, appearing specially for the sole purpose of challenging the United States District Court for the District of Connecticut, which motion was a re-argument of the motion decided by the court on June 12, 1919, and which motion on the re-argument was denied by the court on the 30th day of November, 1921.

56 & 57 3. The court, as a United States District Court, erred in assuming jurisdiction over the person of the defendant against his consent, and in entering judgment against him by default in favor of the plaintiff for $10,337 56/100.

By reason whereof, defendant prays that the judgment aforesaid may be reversed, etc.

ELIJAH N. ZOLINE,
Attorney for Defendant.

A true copy.

Attest:

[SEAL.] C. E. PICKETT,
Clerk.

58 [Endorsed:] 2093 Law. United States District Court for the District of Connecticut. The Weil Corset Company, Inc., Plaintiff, against Charles Munter, Defendant. Assignment of Errors. Elijah N. Zoline, Attorney for Defendant, 35 Nassau Street, Borough of Manhattan, New York City. Filed 28 Dec., 1921. C. E. Pickett, Clerk.

59 United States District Court for the District of Connecticut.

THE WEIL CORSET COMPANY, INC., Plaintiff,

against

CHARLES MUNTER, Defendant.

Order Allowing Writ of Error.

The defendant, appearing specially and for the sole purpose of challenging the jurisdiction of the United States District Court for the District of Connecticut over the person of the defendant, having heretofore moved the court for an order quashing the service of the subpœna and complaint herein upon the ground that service thereof was made upon him outside of the District of Connecticut, to wit, in the City and State of New York, and said motion having been denied, and upon a re-argument of said motion duly allowed by the court, the said motion having again been denied, and it appearing that judgment by default has been entered in favor of the plaintiff and against the defendant in the sum of $10,337 56/100, and the defendant having duly presented his petition for a Writ of Error, together with an assignment of errors, it is hereby

Ordered, that a Writ of Error do issue from the Supreme Court of the United States to the United States District Court for the District of Connecticut, as prayed for in the petition of the
60 & 61 said defendant, and that a citation thereon be issued, served and returned to the United States Supreme Court, and it is further

Ordered, that upon the defendant filing a bond in the penal sum of Twelve Thousand Dollars conditioned according to law, he will prosecute said Writ of Error to effect, and shall answer to the plaintiff for all costs and damages that may be adjudged or decreed on account of said Writ of Error that the Writ of Error do operate as

a supersedeas pending the final disposition of the said Writ of Error as is by law provided.

EDWIN S. THOMAS,
United States District Judge.

A true copy.
Attest:
[SEAL.] C. E. PICKETT,
Clerk.

62 [Endorsed:] United States District Court for the District of Connecticut. The Weil Corset Company, Inc., Plaintiff, against Charles Munter, Defendant. Order Allowing Writ of Error. Elijah N. Zoline, Attorney for Defendant, 35 Nassau Street, Borough of Manhattan, New York City. Filed 28 Dec., 1921. C. E. Pickett, Clerk.

63 Indemnity Insurance Company of North America, Philadelphia.

Know all men by these presents, That we, Charles Munter, of the City of New York, as principal, and Indemnity Insurance Company of North America, Philadelphia, Pennsylvania, as surety, are held and firmly bound unto The Weil Corset Company, Inc., of the City of New Haven, Connecticut, in the full and just sum of Twelve Thousand ($12,000.00) Dollars, to be paid to the said The Weil Corset Company, Inc., its administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 29th day of December, 1921.

Whereas, lately at a term of the District Court of the United States for the District of Connecticut in a suit pending in said Court between The Weil Corset Company, Inc., plaintiff, and Charles Munter, defendant, a judgment was rendered against the said Charles Munter for Ten Thousand Three Hundred Thirty-Seven and 56/100 ($10,337.56) — and the said Charles Munter having obtained a Writ of Error from the Supreme Court of the United States to reverse the judgment in the aforesaid suit.

Now, the condition of the above obligation is such, that, if the said Charles Munter shall prosecute his Writ of error to effect and will pay the amount of the said judgment, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

CHARLES MUNTER.
[SEAL.] INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
By GEO. H. SCHNEIDER,
Resident Vice President.

Attest:
E. M. McCARTHY,
Resident Assistant Secretary.

64 STATE OF NEW YORK,
County of New York, ss:

On this 29th day of December, 1921, before me personally came Charles Munter, to me known and known to me to be the individual described in said bond and who acknowledged to me that he executed the same.

[SEAL.] MYER KELLER,
Notary Public, Bronx Co., 1.

Cert. filed in New York Co. No. 2.
My commission expires Mar. 30, 1922.

65 & 66 Indemnity Insurance Company of North America.

Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.

STATE OF NEW YORK,
County of New York, ss:

On this 29th day of December one thousand nine hundred and Twenty-One before me personally came Geo. H. Schneider, known to me to be the Resident Vice-President of the Indemnity Insurance Company of North America, the corporation described in and which executed the within and foregoing Bond of Charles Munter as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said Indemnity Insurance Company of North America, is duly and legally incorporated under the laws of the State of Pennsylvania; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Charles Munter is the corporate seal of said Indemnity Insurance Company of North America, and was thereto affixed by the order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with E. M. McCarthy and knows him to be the resident Assistant Secretary of said Company; that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors; and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution, exceed its debts and liabilities of every nature whatsoever, by more than the sum of One Million Five Hundred Thousand ($1,500,000) Dollars.

That Wm. A. Thompson, 122 William St., N. Y., is the agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

GEO. H. SCHNEIDER.
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 29th day of December 1921.

[SEAL.] HAROLD P. HALL, *N. P.*
(Officer's signature, description and seal.)

Notary Public, Bronx County.
Bronx County, Clerk's No. 87, Bronx Register's No. 2290.
Certificate filed in N. Y. County Clerk's No. 594. Register's No. 2428.
Certificate filed in Kings County Clerk's No. 175. Register's No. 2223.
Certificate filed in Queens County Clerk's No. 2127.
Certificate filed in Westchester County Clerk's Office & Register's Office.
Commission expires March 30, 1922.

A true copy.
Attest:
[SEAL.] C. E. PICKETT,
Clerk.

67 [Endorsed:] No. 2093, Law. U. S. District Court, District of Conn. Weil Corset Co., Inc., vs. Charles Munter. Bond. Filed Jan. 5, 1922. C. E. Pickett, Clerk.

68 & 69 United States District Court for the District of Connecticut.

THE WEIL CORSET COMPANY, INC., Plaintiff,

against

CHARLES MUNTER, Defendant.

Certificate.

I, the undersigned, United States District Judge, for the District of Connecticut, hereby certify that the above-entitled cause was heard by me, and that the sole question involved and passed upon by me was one of jurisdiction of the United States District Court for the District of Connecticut over the person of the defendant, Charles Munter, as shown by the record in this cause.

The defendant did not contest the action on the merits, and judgment in favor of the plaintiff and against the defendant was entered by default.

EDWIN S. THOMAS,
United States District Judge.

Dated, December 28th, 1921.

A true copy.
Attest:
[SEAL.] C. E. PICKETT,
Clerk.

70 [Endorsed:] 2093, Law. United States District Court for the District of Connecticut. The Weil Corset Company, Inc., Plaintiff, against Charles Munter, Defendant. Certificate. Elijah N. Zoline, Attorney for Defendant, 35 Nassau Street, Borough of Manhattan, New York City. Filed 28 Dec., 1921. C. E. Pickett, Clerk.

71 & 72 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the District of Connecticut, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea, which is in the District Court before you, or some of you, between The Weil Corset Company, Inc., plaintiff, and Charles Munter, defendant, a manifest error hath happened to the great damage of the said defendant, as is said and appears by his complaint, we, being willing that such error, if any, hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Justices of the Supreme Court of the United States at Washington, D. C., together with this writ, so that you have the same at the said place before the Justices aforesaid within thirty days from the date hereof that the record and proceedings aforesaid, being inspected, the said Justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 28th day of December, in the year of Our Lord, one thousand nine hundred and twenty-one.

C. E. PICKETT,
Clerk of the District Court of the United States, for the District of Connecticut.

Above Writ allowed Dec. 28, 1921.
EDWIN S. THOMAS,
U. S. Dist. Judge.

A true copy.
Attest:
[SEAL.] C. E. PICKETT,
Clerk.

73 [Endorsed:] United States District Court for the District of Connecticut. The Weil Corset Company, Inc., Plaintiff, against Charles Munter, Defendant. Writ of Error. Elijah N. Zoline, Attorney for Defendant, 35 Nassau Street, Borough of Manhattan, New York City. Filed 28 Dec. 1921. C. E. Pickett, Clerk.

74 & 75 United States District Court, District of Connecticut.

THE WEIL CORSET CO., INC., Plaintiff,

against

CHARLES MUNTER, Defendant.

To Slade, Slade & Slade, Attorneys for Plaintiff:

Please take notice that on the 4th day of January, 1922, the undersigned filed with the Clerk of this Court a Præcipe for the Record to be transmitted to the United States Supreme Court on the Writ of Error sued out in the above cause, a copy of which Præcipe is herewith served on you.

Dated, January 5th, 1922.

ELIJAH N. ZOLINE,
Attorney for Defendant.

35 Nassau Street, Borough of Manhattan, New York City.

Service of a copy of the within notice and copy of Præcipe is hereby accepted this 5th day of January, 1922.

BENJAMIN SLADE,
Attorney for Plaintiff.

A true copy:
Attest:
[SEAL.] C. E. PICKETT,
Clerk.

76 [Endorsed:] 2093 Law. United States District Court, District of Connecticut. The Weil Corset Co., Inc., Plaintiff, against Charles Munter, Defendant. Notice of Filing of Præcipe. Elijah N. Zoline, Attorney for Defendant, 35 Nassau Street, Borough of Manhattan, New York City. Filed 5 Jan. 1922. C. E. Pickett, Clerk.

77 United States District Court, District of Connecticut.

2093 Law.

THE WEIL CORSET CO., INC., Plaintiff,

against

CHARLES MUNTER, Defendant.

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above-entitled case for the use of the Supreme Court of the United States by including therein the following:

1. Writ and Complaint, filed June 5th, 1918;

2. Return of Writ showing service thereof, filed June 18, 1918;

3. Motion to erase, filed August 30, 1918;

4. Opinion denying motion to erase, filed June 12th, 1919;

5. Affidavit of Alex. Sydney Rosenthal, on re-argument of motion to erase, filed on November —, 1921;

6. Opinion of Judge Thomas, denying motion on re-argument of motion to erase, filed November 30, 1921;

7. Judgment, filed December 6, 1921;

8. Petition for Writ of Error, filed December 19th, 1921;

9. Assignment of Errors, filed December 28th, 1921;

10. Order allowing Writ of Error and Supersedeas, filed December 28th, 1921;

78 & 79 11. Writ of Error, filed December 28th, 1921;

12. Certificate of jurisdictional question, filed December 28th, 1921;

13. Bond, filed January 5th, 1922;

14. Præcipe, filed January 5th, 1922;

15. Notice of filing of Præcipe, filed January 5th, 1922;

16. Docket entries.

17. Affidavit of Samuel Weil, filed Nov. 28, 1921.

Dated, January 5th, 1922.

ELIJAH N. ZOLINE,
Attorney for Defendant.

A true copy.

Attest:

[SEAL.] C. E. PICKETT,
Clerk.

80 [Endorsed:] United States District Court, District of Connecticut. The Weil Corset Co., Inc., Plaintiff, against Charles Munter, Defendant. Præcipe. Elijah N. Zoline, Attorney for Defendant, 35 Nassau Street, Borough of Manhattan, New York City.

81 & 82 No. 2093.

Docket Entries.

Slade, Slade & Slade, New Haven, Conn., for Plaintiff.
Frederick C. Taylor, Stamford, Conn., for Defendant.
(Specially to plead to jurisdiction.)

THE WEIL CORSET COMPANY

vs.

CHARLES MUNTER.

1918.

June 5. Complaint demanding damages of $7,273.56 filed.
Writ issued, returnable first Monday of September 1918, and placed into the hands of the Marshal for service.
Benjamin Slade, Esq., of New Haven, recognized in the sum of $150. to prosecute, etc.
Certified copy writ and complaint handed to Marshal for service.

June 18. Writ returned showing service upon defendant June 6th, 1918.

Aug. 30. Defendant's motion to erase filed in duplicate and duplicate mailed plaintiff's attorney.

Sept. 24. Motion heard. Decision reserved.

1919.

June 12. Memorandum of decision authorizing decree denying motion of defendant to erase filed.

1921.

Feb. 24. Assigned for trial 29 March at New Haven, nisi.

Oct. 20. Court copies 10 fols. at 10 cents each.

Nov. 18. Hearing on motion to reconsider had. Defendant to file motion by November 21st, 1921.

" 28. Hearing had. No appearance for defendant. Statement by attorney for plaintiff.

" 28. Judgment entered for plaintiff.

" 28. Affidavit of Samuel Weil re judgment on default filed.

" 30. Memorandum on matter argued Nov. 18, 1921, filed. Motion to re-open and motion to dismiss denied.

Dec. 6. Judgment in the sum of $7,273.56 damages with interest and costs, filed.

" 9. Certified copy of judgment made and mailed to attys. for plf.

" 28. Defendant's petition for writ of error, filed.

" 28. Order allowing writ of error filed and entered.

" 28. Writ of error filed.

" 28. Certificate filed.

" " Assignment of errors, filed.

1922.
Jan. 5. Citation filed.
" " Notice of filing of præcipe filed.
" " Bond filed.
" " Præcipe filed.
Affidavit of Alex. Sidney Rosenthal filed Wednesday, Nov. —, 1921.

A true copy.
Attest:
C. E. PICKETT,
Clerk.

83 [Endorsed:] Form No. 680. No. 2093. Law. In the District Court of the United States for the District of Connecticut. The Weil Corset Co. vs. Charles Munter. Docket Entries.

84 & 85 United States District Court, District of Connecticut.

WEIL CORSET COMPANY, INC., Plaintiff,

against

CHARLES MUNTER, Defendant.

I, Charles E. Pickett, Clerk of the District Court of the United States for the District of Connecticut, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record, prepared and made by me in accordance with the Præcipe filed in the above-entitled cause as the same appear from the original records and files thereof, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of New Haven, in said District, this 12" day of January, 1922.

C. E. PICKETT,
Clerk.

86 [Endorsed:] United States Supreme Court. Charles Munter, plaintiff-in-error, vs. The Weil Corset Co., Inc., deft.-in-error. Transcript of Record. Elijah N. Zoline, Attorney for plff.-in-error, 35 Nassau Street, Borough of Manhattan, New York City.

87 & 88 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Weil Corset Company, Inc., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a Writ of Error filed in the

Clerk's office of the District Court of the United States for the District of Connecticut, wherein Charles Munter is plaintiff-in-error, and you are the defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edwin S. Thomas, Judge of the District Court of the United States, for the District of Connecticut, this 28th day of December, in the year of Our Lord, one thousand nine hundred and twenty-one.

EDWIN S. THOMAS,
United States District Judge.

Service of a copy of the above citation is hereby admitted this 5th day of January, 1922.

BENJAMIN SLADE,
Attorneys for Defendant-in-Error.

89 [Endorsed:] 2093. Law. United States District Court for the District of Connecticut. The Weil Corset Company, Inc., Plaintiff, against Charles Munter, Defendant. Citation. Elijah N. Zoline, Attorney for Defendant, 35 Nassau Street, Borough of Manhattan, New York City.

[Stamped:] United States District Court, District of Connecticut. Filed Jan. 5, 1922. Charles Elliott Pickett, Clerk.

Endorsed on cover: File No. 28,663. Connecticut D. C. U. S Term No. 708. Charles Munter, plaintiff in eror, vs. The Weil Corset Company, Inc. Filed January 20, 1922. File No. 28,663.

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 255.

CHARLES MUNTER,

Plaintiff-in-Error,

against

THE WEIL CORSET COMPANY, INC.,

Defendant-in-Error.

BRIEF IN BEHALF OF THE PLAINTIFF-IN-ERROR.

ELIJAH N. ZOLINE,
Attorney for Plaintiff-in-Error,
233 Broadway,
New York City.

PRESS OF FREMONT PAYNE, INC., 80 Washington St., New York City.

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 255.

CHARLES MUNTER,
Plaintiff-in-Error,
against
THE WEIL CORSET COMPANY, INC.,
Defendant-in-Error.

BRIEF IN BEHALF OF THE PLAINTIFF-IN-ERROR.

Statement.

This is a direct writ of error to this court by the plaintiff-in-error on the single question of jurisdiction from the final judgment entered in the District Court of the United States for the District of Connecticut on the 28th day of November, 1921, in favor of the defendant-in-error and against the plaintiff-in-error in the sum of $10,337.56, damages with interest and costs (Rec., page 30-31).

The facts are as follows:

On the 5th day of June, 1918, the Clerk of the District Court of the United States for the District of Connecticut issued a summons against the plaintiff-in-error, directing him to appear at Hartford, Connecticut, on the first Monday of September, 1918, to answer to the complaint of the defendant-in-error for goods sold and delivered and for damages for breach of a certain contract therein specified. It is alleged in the summons that the plaintiffs in the action were citizens and residents of the City of New Haven in the State of Connecticut, and that the defendant was and is a citizen and resident of the City of New York in the Southern District of New York (Record, pages 1-3). The defendant-in-error placed this summons in the hands of the United States Marshal for the Southern District of New York, where the plaintiff-in-error resides, and on the 6th day of June, 1918, the said Marshal served the summons so issued by the Clerk of the United States District Court for the District of Connecticut on the plaintiff-in-error at the Hotel McAlpin in New York City, N. Y. (see Marshal's return, Record, page 16).

Whereupon, on August 30, 1918, before the return day, the plaintiff-in-error filed in the United States District Court for the District of Connecticut the following motion (Record, page 17):

> "The defendant moves that the above entitled case be erased from the docket, because it appears from the writ and complaint therein that the defendant was at the time of the commencement of said action a resident of the State of New York, and it appears from the return thereon that service of said writ and

complaint was not otherwise made upon him than by leaving a copy of said writ and complaint with him in the Borough of Manhattan, City, County and State of New York.

Charles Munter, Defendant.
By Frederick C. Taylor, his Attorney."

This motion was denied by the court on June 12, 1919, upon the sole ground that under the Conformity Act it was necessary for the defendant to comply with the Statutes of the State of Connecticut as to pleading and practice; that under the practice of the State of Connecticut, it was necessary for the defendant to file a plea in abatement raising the question of jurisdiction, instead of by motion as was done by the defendant; and, the Court further held that the objection to the jurisdiction of the court was waived by the defendant's failure to take advantage of it by a plea in abatement, concluding with a prayer for judgment (see opinion, Record, 17 to 20 inclusive).

The matter rested without any further action on the part of any one until November 18, 1921, when the plaintiff-in-error by another counsel, Alex Sidney Rosenthal, by leave of court, again appeared specially for the sole purpose of challenging the jurisdiction of the court and of moving for an order to erase the cause from the docket (Record 21). In his affidavit, Mr. Rosenthal reviewed the history of the case as above set forth and asked that the decision rendered by the court entered on June 12, 1919, be vacated, but the Court, on re-consideration of the matter, reaffirmed its original opinion (Record, pages 24 to 28 inclusive). Whereupon, judgment was entered by default against the

plaintiff-in-error and in favor of the defendant-in-error on the 6th day of December, 1921 (Record, 30-31). The defendant below then sued out this writ of error from this Court.

The order allowing the writ of error recites the jurisdictional question as above set forth (Record 33) and the trial judge filed a certificate (Record 36) setting forth that the sole question involved and passed upon by the Court was one of the jurisdiction of the United States District Court for the District of Connecticut over the person of the defendant, Charles Munter, as shown by the record in this case; that the defendant below did not contest the action upon the merits, and that the judgment against the plaintiff-in-error was entered by default (Record 36).

The jurisdiction of this Court is complete.

Davis vs. *Cleveland, Cincinnati & St. L. R. R. Co.*, 217 U. S., 157.

Errors Relied Upon.

1. The Court erred in denying the motion made by the defendant, appearing specially for the sole purpose of challenging the jurisdiction of the United States District Court for the District of Connecticut to quash the service of the subpoena and complaint, which motion was made on the ground that service of the subpoena and complaint was made on the defendant outside of the District of Connecticut, to wit, in the City and State of New York, and for which reason, the United States District Court for the District of Connecticut was without jurisdiction over the person of the defendant, and which said motion was denied by the court on June 12, 1919 (Ass. of errors No. 1, Record 32).

2. The Court erred in denying the motion made by the defendant, appearing specially for the sole purpose of challenging the jurisdiction of the United States District Court for the District of Connecticut, which motion was a re-argument of the motion decided by the court on June 12, 1919, and which motion on the re-argument was denied by the court on the 30th day of November, 1921 (Ass. of errors No. 2, Record 32).

3. The court, as a United States District Court, erred in assuming jurisdiction over the person of the defendant against his consent, and in entering judgment against him by default in favor of the plaintiff for $10,337.56 (Ass. of errors No. 3, Record 32).

ARGUMENT.

POINT I.

The Court erred in denying the motion made by the defendant, appearing specially for the sole purpose of challenging the jurisdiction of the United States District Court for the District of Connecticut to quash the service of the subpoena, which motion was made on the ground that service of the subpoena and complaint was made on the defendant outside of the District of Connecticut, to wit, in the City and State of New York, and for which reason, the United States District Court for the District of Connecticut was without jurisdiction over the person of the defendant, and which said motion was denied by the Court on June 12, 1919.

It is not seriously disputed that the process of the District Court of the United States for the Dis-

trict of Connecticut in an ordinary civil action does not extend beyond the territorial limits of such district and could not reach a party in the City of New York, located in the Southern District of New York. It will be observed that the plaintiff-in-error, the defendant below, was not found within the District of Connecticut, and the process was served on him in the City of New York. Accordingly, the service was absolutely void.

Goldey vs. *Morning News*, 156 U. S., 518;
~~37 U. S., 200;~~
Cutschalk vs. *Peck*, 261 Fed., 212, construing the various sections of the Federal Judicial Code;
Harkness vs. *Hyde*, 98 U. S., 476;
Butterworth vs. *Hill*, 114 U. S., 128;
Bank of Jasper vs. *First National Bank*, 258 U. S., 112;
Mexican Central R. R. Co. vs. *Pinkney*, 149 U. S., 194.

In *Goldey* vs. *Morning News, supra,* this Court said:

> "It is an elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction except by actual service of notice within the jurisdiction upon him, or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service."

In *Gutschalk* vs *Peck,* supra, the plaintiff was a resident of Ohio and the defendant a resident of

Nebraska. The process issued in an action at law by the District Court of the United States of the Northern District of Ohio was served on the defendant in Nebraska. On motion of the defendant the service was quashed. The Court in its opinion reviewed the various provisions of the judicial code in the light of the earlier acts and held that as the defendant was not found in the district of Ohio the service in Nebraska was void.

In *Harkness* vs. *Hyde, supra,* a process issued by the District Court of the United States of the territory of Idaho was served on the defendant at his place of residence, which was on an Indian Reservation. The defendant moved to dismiss the cause, but it was argued as a motion to set aside the service and this court treated it as having only that extent. In deciding the case this court, at page 478 said:

> "There can be no jurisdiction in a court of a Territory to render a personal judgment against any one upon service made *outside its limits. Personal service within its limits,* or the voluntary appearance of the defendant, is essential in such cases. It is only where property of a non-resident or of an absent defendant is brought under its control, or where his assent to a different mode of service is given in advance, that it has jurisdiction to inquire into his personal liabilities or obligations without personal service of process upon him, or his voluntary appearance to the action. Our views on this subject are expressed at length in the late case of *Pennoyer* vs. *Neff* (95 U. S., 714), and it is unnecessary to repeat them here." (Italics ours.)

In *Butterworth* vs. *Hill*, supra, a process issued by the Circuit Court of the United States for the District of Vermont was served upon the Commissioner of Patents, in Washington, D. C., and, although the Commissioner of Patents endorsed the acceptance of service upon the summons, it was held by this court that the Circuit Court of the United States was without jurisdiction and that the Commissioner, by endorsing service, did not waive his right to object to the jurisdiction of the court.

The learned District Judge below justified his decision in the instant case upon the sole ground that under the Conformity Act, it was necessary for the defendant, under the law of Connecticut, to file a plea in abatement and pray for judgment and, as the defendant (the plaintiff-in-error) did not do so, and raised the point by a motion to erase from the docket, the question of jurisdiction thus presented could not be entertained, and that the defendant (the plaintiff-in-error) thereby involuntarily waived the question of jurisdiction and in effect converted his special appearance in to a general one (see opinion, pages 17 to 20 inclusive).

The ruling of the court was and is clearly erroneous for the following reasons:

(a) The Conformity Act does not to apply to questions of jurisdiction of the Federal Court, and the law of the State upon this branch of jurisprudence is not conclusive or binding upon the Federal Courts.

In *Mechanical Appliance Company* vs. *Castleman*, 215 U. S., 437, the court at page 443 said:

> "Moreover, in cases which concern the jurisdiction of the Federal courts, notwithstanding

> the so-called conformity act, Revised Stats., §914, neither the statutes of the State nor the decision of its courts are conclusive upon the Federal courts. The ultimate determination of such questions of jurisdiction is for this court alone. Western Loan & Savings Co. vs. Butte & Boston Consolidated Mining Co., 210 U. S., 368, 369; Mexican Central Railway Co. vs. Pinkney, 149 U. S., 194."

It was further held in the *Mechanical Appliance Co.* vs. *Castleman,* supra, that in an action at law, a defendant may raise the question of service by *motion or plea.*

On review of the authorities this court at page 444 Reid

> "Neither of these cases involved the right of the defendant to appear upon attempted service in an action at law, *and by motion, or plea for that purpose,* raise the question of jurisdiction over his person." (Italics ours.)

And in *Harkness vs. Hyde,* supra, this court at page 479 said:

> "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by

the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. *It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived.*

"The judgment of the Supreme Court of the Territory, therefore, must be reversed, and the case remanded with directions to reverse the judgment of the District Court for Oneida County, and to direct that court to set aside the service made upon the defendant; and it is so ordered." (Italics ours).

In *Mexican Central Railway Co.* vs. *Pinkney*, supra (149 U. S., 194), this court at page 209 commented on the *Harkness* case in the following language:

"In *Harkness* vs. *Hyde*, 98 U. S., 476, it was held by this court that illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied by his answering to the merits. Such illegality is considered as waived only when he, without having insisted upon it, pleads in the first instance to the merits. *We are of opinion that under the statutes of the United States the jurisdiction of the Federal Courts, sitting*

in Texas, is not to be controlled by the statutes of that State above referred to. Jurisdiction is acquired as against the person by service of process; but as against property within the jurisdiction of the court, personal service is not required. Boswell vs. Otis, 9 How., 336; Pennoyer vs. Neff, 95 U. S., 714. But it is well settled that no court can exercise, at common law, jurisdiction over a party *unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears.* Kendall vs. United States, 12 Pet., 524; Harris vs. Hardeman, 14 How., 334." (Italics ours.)

(b) The procedure followed by the defendant (the plaintiff-in-error) in moving to erase from the docket was in accord with the law of Connecticut.

In the case of *Williams Company* vs. *Mairs,* 72 Conn., 430, the court said:

> "It was, therefore, competent for the defendants, after entering a special appearance for the purpose of objecting to the assumption of jurisdiction, to move that the cause be erased from the docket."

We again respectfully call attention to the decision by this court in *Harkness* vs. *Hyde,* supra, where this court said:

> "It is only where he (the defendant) pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

That the Federal Courts look with disfavor upon the practice of transforming a special appearance into a general one, see *Waters* vs. *Central Trust Co.*, 126 Fed., 469, C. C. A., 2nd Circuit, and cases cited and *Bank of Jasper* vs. *First National Bank*, 258 U. S., 112.

POINT II.

The Court erred in denying the motion made by the defendant, appearing specially for the sole purpose of challenging the jurisdiction of the United States District Court for the District of Connecticut, which motion was a re-argument of the motion decided by the Court on June 12, 1919, and which motion on the re-argument was denied by the Court on the 30th day of November, 1921 (Assignment of error, No. 2).

The Court, as a United States District Court, erred in assuming jurisdiction over the person of the defendant against his consent, and in entering judgment against him by default in favor of the plaintiff for $10,337.56 (Assignment of error, No. 3).

The argument already advanced under Point I is, we believe, ample to sustain assignment of errors Nos. 2 and 3, and will, therefore, not be repeated.

If the attempted service upon the defendant (the plaintiff-in-error) was illegal and void, and if the defendant by his motion to erase from the docket did not waive his right to object to the jurisdiction of the Court over his person and did not consent to the jurisdiction of the District Court of the United States for the District of Connecticut, the conclusion is irresistible that the judgment entered in the instant case against the plaintiff-in-error was without jurisdiction and that it ought to be reversed.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court of the United States for the District of Connecticut may be reversed with costs with directions to dismiss the suit against the plaintiff-in-error.

Respectfully submitted,

Elijah N. Zoline,
Attorney for Plaintiff-in-error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 255.

CHARLES MUNTER, *Plaintiff-in-Error,*

against

THE WEIL CORSET COMPANY, INC.,
Defendant-in-Error.

BRIEF IN BEHALF OF THE DEFENDANT-IN-ERROR.

BENJAMIN SLADE,
Attorney for Defendant-in-Error.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 255.

CHARLES MUNTER, *Plaintiff-in-Error,*

against

THE WEIL CORSET COMPANY, INC.,
Defendant-in-Error.

BRIEF IN BEHALF OF THE DEFENDANT-IN-ERROR.

POINT I.

The defendant-in-error at the outset deems it appropriate to call this court's attention to the fact that the Record (page 17) discloses that the only motion filed in the court below was the one dated August 30, 1918, to erase the case from the docket. The motion itself does not disclose that it was based on the claim now made that the court below had no jurisdiction over the cause or the parties. Said motion does set forth that it appears that at the time of the institu-

tion of the action the defendant was a resident of the State of New York and it further appears from the return of service that the writ and complaint was not otherwise made upon the plaintiff-in-error than by leaving a copy of the writ and complaint with him in the Borough of Manhattan City, County and State of New York. It is respectfully submitted that this motion in the form that it was drawn does not raise the question of jurisdiction. Neither does said motion disclose that the plaintiff-in-error attempted to assert the personal privilege accorded him to be sued in the district of his residence. The learned court below on June 12, 1919, denied the motion to erase the case from the docket and in an exhaustive opinion (Record, pages 17 to 20, inclusive) set forth its reasons for such ruling. After the ruling was made the plaintiff-in-error had a remedy available to him, namely, to comply with the procedure suggested by the court, to wit, to file a plea to the jurisdiction and abatement in conformity with the statute laws of Connecticut, and to conclude such plea with a prayer for judgment. (See Record, page 18.) Instead of taking that course the plaintiff-in-error remained inactive until the date hereinafter stated. On September 27, 1921, the case was assigned for trial for November 28, 1921, and on November 26, 1921, two days before the date fixed for trial by the court, the then attorney for the plaintiff-in-error verbally moved that the court hear a motion affecting the case which counsel (for plaintiff-in-error) desired to file (Record, page 25). In pursuance to such verbal request the court, on November 18, 1921, did hear counsel for both parties and filed a memoranda (Record, pages 24 to 28, inclusive). The plaintiff-in-error did not at any time after said hearing file any motion

or other pleading in accordance with the leave to file the same as stated in the court's memoranda (Record, page 25). The court in its memoranda said:

> "Hearing was had, nevertheless, on November 18th, even though no motion had been filed, and the argument made by defendant resolved itself into a request to the Court to open the old order and dismiss the case for want of jurisdiction. Counsel for defendant was given leave to file such motion papers as counsel deemed necessary to meet the situation, not later than Tuesday, November 22nd. Certain papers were received on Wednesday, November 23d, and such papers are entitled—'Affidavit of Alex. Sidney Rosenthal, Attorney for defendant, appearing specially' in which affidavit 'the defendant now moves for an order vacating and setting aside the decision of June 12, 1919, and directing that the above-entitled action be erased from the docket of the Court.'"

The affidavit in question did not meet the requirements of a plea in abatement, a plea to the jurisdiction, or even a motion to erase for want of jurisdiction.

POINT II.

There is only one question involved in the case, namely, did the court below have jurisdiction over the subject-matter and over the parties to the cause? As to the existence of jurisdiction over the subject-matter there can be no question for the complaint sets forth diversity of citizenship and the requisite amount is involved. Interior Construction Co. vs. Gibney, 160 U. S. 219. As to the jurisdiction over the parties to the action under the Conformity Act it was the duty of

the plaintiff-in-error to comply with the practices, pleadings and forms of the State of Connecticut within which the District Court of the United States was held (Section 5 of Chapter CCLV of U. S. Statutes at Large).

Under the statute laws of the State of Connecticut (Section 5630 of the General Statutes of that State, revision 1918), it is provided as follows:

> "If the defendant desires to plead to the jurisdiction, or in abatement, or both, he shall take such exceptions in one plea, substantially in the following form:
>
> The defendant pleads in abatement because (Here state all the particular exceptions to the jurisdiction, and causes of abatement, and how the plaintiff might, or should, have brought his action in order to avoid them, if they are such as could have been avoided). And—Therefore he prays judgment. By A. B., his attorney."

See also *Coughlin v. McElroy*, 72 Conn. 444, 448; *Mitchell vs. Smith*, 74 Conn. 125.

In the Mitchell case, *supra*, the court, in deciding that the plea in abatement there filed was insufficient (at page 127) says:

> "The plea did not contain a prayer for judgment, and for this reason was undoubtedly bad."

The plaintiff-in-error in the court below and in his brief on the present writ of error cites in support of his contention that the motion to erase was proper, the case of *Williams Company v. Mairs*, 72 Conn., 430, in which the court held that:

> "It was, therefore, competent for the defendants, after entering a special appearance for the purpose of objecting to the assumption of jurisdiction, to move that the cause be erased from the docket."

That decision is no authority for the proposition involved in the case at bar because in that case the lack of jurisdiction appeared from the writ and complaint itself. Under such circumstances the Court could at any time of its own motion or upon motion of the defendant erase the case from the docket, for want of such jurisdiction. In the case at bar all the elements necessary to confer jurisdiction were present except the alleged defective service upon the plaintiff-in-error and as already suggested that involved a personal privilege which could be waived and was waived unless advantage of such defective service was taken by such methods as were prescribed by the practice, pleadings, processes and modes of the State of Connecticut as required by the Conformity Act. The method, as already pointed out, required the filing of a plea to the jurisdiction and abatement setting forth the grounds upon which it was based and to conclude with a prayer for judgment. The Court below found that plaintiff-in-error did waive that personal privilege.

St. Louis Railway vs. McBride, 141 U. S. 127;
Ex Parte vs . Schillenberger, 96 U. S. 369;
National Bank vs. Morgan, 132 U. S. 141;
Fitzgerald Construction Co. vs. Fitzgerald, 137 U. S. 98.

The action in question was instituted on the 5th day of June, 1918, and was made returnable to the Court on the 1st Monday of September, 1918, and after the

Court denied the motion to erase the case from the docket, filed on August 30, 1918, no further steps of any character or description were taken by the plaintiff-in-error except the verbal application of his attorney that he desired to file a motion which was never filed. (Record, page 25.) A verbal motion was made that the Court re-open the old order and dismiss the case for want of jurisdiction. (Rec., p. 25.) The statute of limitations barred the defendant's cause of action against the plaintiff-in-error and if the ruling of the Court below is reversed defendant-in-error is barred from proceeding on the original causes of action. This result should be avoided unless a substantial right now exists in the plaintiff-in-error. If the plaintiff-in-error had complied with the suggestion of the Court and had filed a proper plea to the jurisdiction and abatement, which the Court no doubt would have sustained, then the defendant-in-error could have brought a new action in the jurisdiction of the Court where the plaintiff-in-error resided and thereby have had his day in court. The plaintiff-in-error having refused to take the steps suggested by the Court in order to properly raise the question of defective service is now barred from asserting such right. The personal privilege of objecting to defective service of process was waived by the plaintiff-in-error in refusing to take appropriate steps to protect whatever rights he may have had in the premises. The case having been set for trial on September 17, 1921, for November 28, 1921, and the plaintiff-in-error having failed to appear the Court directed on the latter day that counsel for the plaintiff-in-error be notified on the long distance telephone that the case was down for trial on said date, and he was so notified (Record, page 31). But the plaintiff-in-error's counsel

notified the Court that he did not propose to proceed further in the case (Record, page 31), and thereby wilfully ignored the Court and the whole proceeding. Whereupon the Court heard the defendant-in-error and after the defendant-in-error filed a verified statement of the claim, as required by the laws of the State of Connecticut, rendered judgment *by default* in favor of the defendant-in-error. The present writ of error was procured, thereby challenging the power of the trial court to render judgment by default. In the brief of the plaintiff-in-error under Point I and in other portions of the brief it is suggested that the plaintiff-in-error in the Court below moved to quash the service of the subpoena and complaint served upon the plaintiff-in-error but the printed Record now before the Court will not sustain that suggestion. At no time was any motion made to *quash the service* of the subpoena and complaint and the only motion that was made by the plaintiff-in-error in the Court below was the motion to erase the case from the docket (Record, page 17). Under the practice and pleadings and rules of procedure in the State of Connecticut advantage for defective service of process must be taken as already suggested by a plea to the jurisdiction and abatement and the plea, in addition to being concluded with a prayer for judgment, must set forth how the plaintiff might or should have brought his action in order to avoid the complaint made.

The plaintiff-in-error, under Point II of his brief, assigns as error the Court's ruling:

> "in denying the motion mde by the defendant, appearing specially for the sole purpose of challenging the jurisdiction of the United States District Court for the District of Connecticut, which mo-

tion was a re-argument of the motion denied by the court on June 12, 1919, and which motion on the re-argument was denied by the court on the 30th day of November, 1921."

As already suggested in this memoranda there was but one motion filed (Record, page 17), but the Court, on November 18 did give plaintiff's counsel leave "to file such motion papers as counsel deemed necessary * * *." But no further steps in that direction were taken by the plaintiff-in-error. How, under these circumstances, can the plaintiff-in-error find any justification for complaint? The conduct on the part of the plaintiff-in-error, as disclosed by the Record, fully warranted the Court below in concluding that the plaintiff-in-error had waived his right to assert the personal privilege involving service of process within the jurisdiction of the Court to which the action was made returnable.

The conduct on the part of the plaintiff-in-error, as disclosed by the Record, fully warranted the conclusion of the Court below that "the failure to take any proper action in over two years was equivalent to a waiver of the privilege under all circumstances of this case and the defendant (plaintiff-in-error) is now estopped to insist for the recognition of such privilege, especially as it appears that the statute of limitation has now run against the plaintiff's cause of action."

It is respectfully submitted that the rulings of the Court below are amply justified in view of the facts disclosed by the Record and the conclusion reached should not be disturbed.

Respectfully submitted,

BENJAMIN SLADE,
Attorney for Defendant-in-Error.

MUNTER *v.* WEIL CORSET COMPANY, INC.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

No. 255. Argued January 22, 1923.—Decided February 26, 1923.

1. In an action on contract in the District Court valid service on the defendant cannot be made in another district and State. P. 277.
2. Motion by a defendant in the District Court that the cause be "erased from the docket", for want of proper service, *held* in effect a motion to dismiss for want of jurisdiction. P. 277.
3. The methods of raising questions of jurisdiction in the federal courts are not controlled by state procedure and the Conformity Act (Rev. Stats. § 914), but are determined by this Court. P. 278.
4. A defendant who seasonably objects to a void service of process does not submit to the jurisdiction by failing to conform to an erroneous view of the District Court on the manner of raising the objection, or by subsequent inactivity concurred in by the opposite party. P. 278.

Reversed.

ERROR to a judgment of the District Court, entered on default in an action for goods sold and delivered and for breach of contract.

Mr. Elijah N. Zoline for plaintiff in error.

Mr. Benjamin Slade for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Action in the District Court for the District of Connecticut, by the Weil Corset Company, a corporation of Connecticut, against Charles Munter, a citizen and resident of New York, for breach of contract, damages being laid at $7,273.26 with interest from November 13, 1914. Service upon Munter was made in New York City.

The case is between citizens of different States and involves more than three thousand dollars, exclusive of

interest and costs. It therefore is within the general jurisdiction of the District Courts. § 24 of the Judicial Code. The plaintiff being a resident of the district in which the suit was brought, the defendant could not object to the venue or place of suit. § 51, Judicial Code. *Camp* v. *Gress*, 250 U. S. 308; *Lee* v. *Chesapeake & Ohio Ry. Co.*, 260 U. S. 653.

But service of process was made upon Munter in New York and he availed himself of the fact by filing on August 30, 1918, before the return day, by his attorney, the following motion: "The defendant moves that the above entitled case be erased from the docket, because it appears from the writ and complaint therein that the defendant was at the time of the commencement of said action a resident of the State of New York, and it appears from the return thereon that service of said writ and complaint was not otherwise made upon him than by leaving a copy of said writ and complaint with him in the Borough of Manhattan, City, County and State of New York."

The court denied the motion on the ground that it "contained no prayer for judgment," a prayer for judgment, it was held, being necessary under the statutes of Connecticut in pleas "to the jurisdiction, or in abatement, or both" and that the condition was made applicable to the District Court by the Conformity Act (§ 914, Revised Statutes, United States). That act provides that "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

It may well be contended that the objection to the motion was more verbal than real. There was substan-

tially a prayer for judgment, the only judgment that could be granted, that is, that the "case be erased from the docket" which, necessarily, meant dismissed for want of jurisdiction in the court over the defendant because the "service of said writ and complaint was not otherwise made upon him than by leaving a copy of said writ and complaint with him in the Borough of Manhattan, City, County and State of New York."

We have decided in cases which concern the jurisdiction of the federal courts that notwithstanding the Conformity Act, neither the statutes of the States nor the decisions of their courts are conclusive upon the federal court, the determination of such questions being "in this court alone." *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437, 443. The motion of Munter, therefore, should have been granted, and the action dismissed.

It is, however, contended that he, by his subsequent conduct, submitted to the ruling and waived his right of objection. The motion was made August 30, 1918. The case was assigned for trial for November 28, 1921. After some correspondence with counsel for plaintiff and some conversation with the court, Munter, through other counsel, moved the court "for an order vacating and setting aside the decision of June 12, 1919, and directing that the above entitled action be erased from the docket of the Court."

The court denied the motion. The court took pains to review the prior proceedings and distinguished between the objections to the jurisdiction that cannot be waived, and those that can be waived, assigning the objection of Munter to the latter, and when they are waived, "the jurisdiction of the court is complete."

The court deduced a waiver from the conduct of counsel, notwithstanding the court conceded that counsel had strenuously insisted upon the objection. The conclusion was reached because in the view of the court the defective

service had not been properly taken advantage of, and that "by failing to follow up the ruling made on June 12, 1919," the defendant was "guilty of gross laches and by his laches" had "waived his right," and this was "equivalent to an actual waiver under the statute accorded him—to object to the jurisdiction."

We are unable to concur. The service on Munter was void. The District Court of Connecticut had no power to send its process to New York for service. *Toland* v. *Sprague*, 12 Pet. 300, 330; *Herndon* v. *Ridgway*, 17 How. 424; *Insurance Co.* v. *Bangs*, 103 U. S. 435. That Munter might have waived his right to object to the service is established by the cases cited by the court. They are all to the effect that pleading to the merits or a general appearance without objecting to the service is a waiver. There is no such pleading or appearance in the present case and no action or conduct tantamount to either. There was delay, it is true, but it was as much the delay of the Corset Company as of Munter, and to this situation the Company brought its action. It subjected its action to the indulgence of Munter and he, in the exercise of his right, immediately declared his opposition to the invalid service made in another district and State. He did all that was incumbent upon him to avail of his right. The court erred by denying it, and erred again in refusing to set aside the order denying it.

Reversed and remanded with directions to dismiss the action.